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IN THE

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OCTOBER TERM, 1969

No. .....

HOMES INC., a Michigan corporation, RICHTER
RUCTION CO., a Michigan corporation, and SEY-
UILDING CO., a dissolved Michigan corporation, on
its shareholders, each for itself and on behalf of all
ders and persons who did apply for building permits,
ay fees pursuant to a certain Resolution of the City of
lated January 13, 1959, and/or Ordinance of the City
Warren No. 58, as amended, and/or Ordinance
f the City of Warren No. 58.1, as amended,
Respondents,

v.

WARREN, a Municipal corporation, its Mayor,
ncilmen, Treasurer, and all other Administrative
Officials having control over the financial
affairs and budgets of the said City,
Petitioners.

ON FOR WRIT OF CERTIORARI TO
E COURT OF APPEALS FOR THE
STATE OF MICHIGAN

norable Chief Justice and the Associate
es of the Supreme Court of
ited States:

tioners, the City of Warren, a Municipal corpor-
Mayor, Councilmen, Treasurer, and all other Ad-

ministrative Officials having control over the financial affairs and budgets of the said City, respectfully petition this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the State of Michigan, rendered in this cause on October 29, 1969, leave to appeal having been denied by the Supreme Court for the State of Michigan on January 26, 1970.

(a) OPINIONS IN THE COURTS BELOW

Opinions and judgment of the Circuit Court for the County of Macomb: *Metro Homes, Inc.*, a Michigan corporation, *et al.*, Plaintiffs *v. City of Warren*, a Municipal corporation, *et al.*, Defendants, Civil Action No. S-65-1067 (February 21, 1968 and June 4, 1968). Copies of the Opinions and Judgment attached as Appendix A.

Opinion of the Court of Appeals for the State of Michigan: *Metro Homes, Inc.*, a Michigan corporation, *et al.*, Plaintiffs and Appellees *v. City of Warren*, a Municipal corporation, *et al.*, Defendants and Appellants (October 29, 1969), 19 Mich. App. 664 (1969). A copy of the Opinion attached as Appendix B.

Order of the Supreme Court for the State of Michigan Denying Leave to Appeal (Calendar No. 52670), dated January 26, 1970. A copy of the Order attached as Appendix C.

(b) JURISDICTION OF THE COURT

The Opinion and holding sought to be reviewed was dated and entered October 29, 1969, and leave to appeal was denied by the Supreme Court for the State of Michigan on January 26, 1970. The statute conferring on this Court jurisdiction to review such Opinion by Writ of Certiorari is 28 U.S.C. 1257.

(c) QUESTIONS PRESENTED FOR REVIEW

1. A city ordinance requires the payment of a sewer tap charge for all sewer taps which utilize and consume the treatment facilities in the city's sewage treatment plant, with the exception of structures existing as of the date of enactment. Is this an unconstitutional discrimination against those persons connecting with the facilities who did not have structures existing as of that date, but who subsequently built structures and then connected?

2. By abrogating an exception provided in the previous city ordinances, a later city ordinance purports retroactively to cure an apparent defect in the first ordinance which resulted from the exception from sewer tap charges for structures existing at the time of enactment of the previous ordinances. Considering the public and private interests involved in the instant case, did the second ordinance effectively cure the apparent defect in the first ordinance?

(d) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal Constitutional provision involved is the Fourteenth Amendment, Section 1 (equal protection and due process). The specific enactments involved are a resolution adopted at the meeting of January 13, 1959 of the Council of the City of Warren, Ordinances 58, 58-1 and 61 of the City of Warren. The petinent texts of these laws are set forth in Appendix D.

(e-g) CONCISE STATEMENT OF THE CASE

By a resolution adopted on January 13, 1959 and two subsequent Ordinances, 58 and 58.1, the Warren City Council established a sewer connection charge of 200 dollars for each newly built structure tapping into the Warren sewage system. Directing their attack at an exemption in the original version favoring structures already completed on January 13, 1959, but not yet connected to the sewage system at that time, a group of builders challenged the constitutionality of the resolution and ordinances. The suit was decided by the Michigan Supreme Court in *Beauty Built Construction Corp. v. City of Warren*, 375 Mich. 229 (1965) (hereinafter cited as *Beauty Built)*. The Court held on April 9, 1965, that failure to charge for connecting residences built before January 13, 1969 made the original resolution ineffective. With minor exceptions, the claims of the seventeen *Beauty Built* builders as judgment creditors have now been fully paid and satisfied.

The Warren City Council undertook to cure the defect in its original resolution of April 20, 1965 by passing Ordi-

nance 61. The purpose was twofold: First, to collect 200 dollars from those persons who had taken advantage of the exemption in the original resolution to tap into the Warren sewage system without charge between January 13, 1959 and the date of Ordinance 61. Second, to provide for future collection of the charge from all residences that were later to tap into the Warren sewer system. After the adoption of Ordinance 61, the City filed with the Michigan Supreme Court an application for rehearing of the *Beauty Built* case, claiming that this action by the City Council had cured the unconstitutionality of the original sewer charge. The application was summarily denied on May 13, 1965 by the Supreme Court, which granted no hearing, and stated no reason for its action.

This suit was instituted in Macomb County Circuit Court on April 14, 1965 as a class action on behalf of all persons who had paid a sewer charge to the City of Warren prior to April 20, 1965, with the exception of those who had already become judgment creditors as a result of the *Beauty Built* decision. Altogether the claim made on behalf of appellees is estimated to approximate five million dollars, including interest to date.

Later an action was commenced in Macomb County Circuit Court against the City, and against a class composed of the persons and firms who paid sewer tap fees to Warren under the original resolution and ordinances for the construction of buildings. The plaintiffs in this suit, *Wheeler v. City of Warren*, Civil Action No. S-65-1192, were a class of those who had purchased buildings from those defendants. They claimed the right to receive back the charges that had been paid. The members of defendant class were, of course, substantially the same persons as the plaintiffs in the instant case. On September 18, 1967, Judge Noe entered a judgment approving a Stipula-

tion of Settlement between the two classes involved in the *Wheeler* case that provides the proceeds of any judgment entered against Warren in the instant case shall be divided among them.

Judge Alton H. Noe issued an opinion on February 21, 1968 granting a summary judgment for the plaintiffs. To resolve questions concerning the sum to be paid in judgment and how it was to be paid, Judge Noe issued a supplementary opinion, dated June 4, 1968, deciding the issue. A judgment was entered in Macomb County Circuit Court on June 10, 1968 in favor of the Petitioners.

Appeal from the Circuit Court's decision was made to the Court of Appeals for the State of Michigan. In an opinion dated October 29, 1969, the Court of Appeals affirmed the lower court's order granting summary judgment in the plaintiffs' favor.

Application for leave to appeal to the Michigan Supreme Court was denied on January 26, 1970. The reasons given were that defendants and appellants had failed to persuade the Court that they had a meritorious basis for appeal, or that the decision of the Court of Appeals was clearly erroneous.

The constitutional issues in this case were first raised in the Circuit Court for the County of Macomb in the pleadings filed in the case. Paragraph 7 of the Complaint alleged the unconstitutionality of Ordinance 58.1:

> "7. That subsequently, to wit, on the 9th day of April, 1965, the Supreme Court of the State of Michigan, did declare said Resolution and Ordinance No. 58.1 of the City of Warren, unconstitutional, as being an unlawful discrimination against Plaintiffs and all others similarly situated. . . ."

In the Answer, Petitioners first raised the issue of the curing effect of Ordinance 61 as an affirmative defense:

> "2. On April 20, 1965, the City of Warren adopted its Ordinance No. 61, whereby all structures connected to the City's sewer system subsequent to January 13, 1959 were made subject to sewer connection charges, whether or not such structures were erected before January 13, 1959, according to a schedule of rates as therein set forth. Thus, Ordinance No. 61 effectively eliminated the unconstitutional feature of the City of Warren sewer connection charges that provided the sole basis for said decision of the Michigan Supreme Court. Inasmuch as said ordinance is otherwise duly adopted and of full effect according to its terms, the City of Warren is not liable to any party or parties whatsoever for repayment of sewer connection charges."

In Paragraph 2 of Plaintiffs' Answer to Affirmative Defenses, Plaintiffs state:

> ". . . that the said Ordinance (61) cannot have the legal effect of giving vitality to legislative enactments already struck down by decision of the Supreme Court."

Paragraph 4 (c) of Plaintiffs' Motion for Summary Judgment further states the constitutional issue:

> "(c) Plaintiffs' rights to recover their sewer tap payments from Warren is a vested cause of action arising under the common law and the Constitution of Michigan and of the United States. Warren may not constitutionally abrogate or destroy those vested rights."

The Circuit Court gave summary judgment for Plaintiffs on these issues, *inter alia.*

The Court of Appeals for the State of Michigan passed on these issues:

> "The defendants urge us to follow the decision of *Seltzer v. Sterling Township (1963)*, 371 Mich. 214, rather than that of *Beauty Built*, and to declare the 1959 resolution valid, with or without the amendatory legislation." (Appendix B, page 44.)

On the validity of the 1959 Resolution the Court stated:

> "Whether these decisions are reconcilable or not, *Beauty Built* settles the question of the 1959 resolutions' validity, for *Beauty Built* involved the same resolution, and it is not for this court to anticipate the Supreme Court's overruling of that decision." (Appendix B, page 45.)

Furthermore, the Court held that the requirements of due process rendered Ordinance 61 ineffective in reimposing a charge for the sewer connections made by the plaintiffs:

> "Such a charge is impermissible, however, for a liability may not be imposed on account of a past act if an enforceable obligation was not occasioned when the act took place. *Forbes Pioneer Boat Line v. Board of Comm'rs* (1922), 258 US 338 (42 S Ct 325; 66 L Ed 647). This rule of due process may be subsumed under the principle that retroactive legislation may not impair vested rights. Its application is limited to those cases where it is concluded that the reason underlying the immunity from liability compels the continuance of the immunity." (Appendix B, page 47.)

(h) ARGUMENT

The questions which this case presents relate to supposed discriminatory treatment of citizens in charging sewer tap fees and to supposed due process violations in enacting retroactive legislation. It is believed that the facts of the case are unique to this Court and that the issues involving the constitutional limitations on the powers of municipal corporations to enact legislation to finance local projects will be of interest to this Court. Petitioners believe that the Court of Appeals for the State of Michigan has rendered a decision on a federal question of substance in a way not in accord with applicable decisions of this Court.

1. Constitutionality of Resolution passed January 13, 1959, and Ordinances 58 and 58-1 of the City of Warren.

In considering the basic claim made by Respondents in this case, we initially refer to the following statement from II Cooley's *Constitutional Limitations,* 824-825 (8th ed. 1927):

> "The guaranty of 'equal protection of the laws' . . . merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed. It is not infringed by legislation which applies only to those persons falling within a specified class, if it applies alike to all persons within such class, and reaonable grounds exist for making a distinction between those who fall within such class and those who do not. . . ."

As this Court stated in *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 at 78, the standards of classification are as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in adoption of police powers, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely *because it is not made with mathematical nicety or because in practice it results in some inequality.* 3. When the classification in such a law is called in question, *if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.* 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." (Emphasis supplied.)

In 1958 and early 1959 Warren faced the immediate and pressing problem of how to provide additional and expanded sewage treatment facilities for the thousands of new residents flocking into the City in numbers far exceeding the most reliable and generous estimates of the City officials. The necessity for these expanded facilities in order to provide the service necessary to meet public health standards is not in dispute. Failing to provide such facilities would result in a building ban imposed by the State Health Department. It was determined that the only reasonable and feasible means of solving the problem of obtaining the necessary funds was to impose the sewer tap fee attacked here. A unanimous resolution of the City Council, adopted on January 13, 1959, established the sewer tap fee applicable to new structures thereafter connecting to the sewer system.

There is no question but that the residential sewer tap fee complained of applies uniformly, and without any ex-

ception whatsoever, to all buildings constructed after January 13, 1959, the effective date of the resolution, which connect to city sanitary sewers. Every building constructed after said date, whether built by individuals, builders or building corporations (such as Respondents) must pay a tapping fee of $200 for the privilege of connecting to the sanitary sewer collection and treatment system. On its face, thus, the legislation is clearly within the test referred to in the previous quote from Cooley's *Constitutional Limitations, supra,* p. 9, that "all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed."

The sole ground for claiming that the sewer tap fee is arbitrary and discriminatory, and thus totally void *ab initio,* is not any claim of discriminatory treatment as between those subject to the charge but that there are others in the same position as Respondents, who are not subject to the charge.

This requires an examination into the questions as to whether, under the facts and circumstances that exist in this case, any reasonable grounds exist for making a distinction between future constructed buildings and those already constructed as to the obligation to pay the sewer tap fees established. In this connection it must be kept in mind that "a classification having some reasonable basis does not offend against that clause merely because it is not made with mathematically nicety or because in practice it results in some inequality . . . ." (*Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61 at 78.) The tapping fees established by the resolution of January 13, 1959 do not apply to "newcomers" to the City, as an attempt to saddle the entire cost of necessary public improvements

upon them to the exclusion of present residents or citizens. The tapping fees are applicable to *all* new buildings built after January 13, 1959, seeking connection to the sewers, whether built or owned by "newcomers," existing residents, or anybody else.

Since this tapping fee was established by official action of the City Council, Warren's governing body, we must turn to their own enactment to determine their officially declared reasons for the action taken. There we find that the connection fee was adopted so that necessary additions to the sewage treatment facilities would be provided out of the fees to be paid by all future constructed buildings, on the logical and reasonable basis that the need for the expanded facilities was created solely because of the unexpected and unanticipated building boom. It was these structures which had burdened the treatment facilities with loads beyond their designed capacities. Existing unconnected buildings did not create the need for expansion, for the sewage treatment plant already in operation had been designed to take care of all existing population and that necessarily covered all existing buildings. Thus, the Council concluded that the sewer tap fee should not apply to the few existing buildings not connected to the sanitary sewers of the City system. Is this reasoning so clearly arbitrary, unreasonable and discriminatory as to render the resolution of January 13, 1959 unconstitutional and void *ab initio?* Clearly not.

The law has long recognized the principle stated in *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 at 78: "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." We submit

that the following additional reasons for not applying the tapping fee to existing unconnected buildings are established or can reasonably be inferred:

1. Existing buildings were built, occupied, and presumably paid for (or were, being paid for), prior to the fixing of said tapping fee, so that the fee was not and could not be included in the cost of the structures being paid for.

2. Existing unconnected buildings had been paying *ad valorem* taxes on improved property for the original sewage treatment plant based upon the valuation for tax purposes of the structure and the land, even though they received no present benefit from the plant, as there was no sanitary sewer to which to connect.

3. Existing unconnected buildings because of the unavailability of sewers to connect to, necessarily had to build septic tanks which (the Court can take judicial notice) cost considerably in excess of the tapping fee. And septic tank facilities would have been sufficient, but for the residents of houses built later. It was *these* structures that brought about a need for the new facilities.

The Respondents thus are still better off, after paying the sewer tap fee, than existing unconnected structures, although the latter do not pay the fee when connection is made. Petitioners contend that the foregoing establishes the reasonableness and propriety of classification for purposes of tap fee payments on the basis of old and new *buildings,* rather than old and new *users.*

2. The Curing Effect of Ordinance 61 of the City of Warren.

No less persuasive is the fact that Warren has remedied the constitutional defect singled out by the Michigan Supreme Court when it decided *Beauty Built*. The question now to be considered is whether Ordinance 61 cured the defect which was found to exist in the sewer connection charge until its adoption.

First, let the argument of Warren be properly stated. The City has never contended that a sewer connection charge effective as of January 13, 1959 could be enacted on April 20, 1965. Warren's City Council *did* have the power, though, to enact a sewer connection charge on January 13, 1959, when it passed a basically valid sewer connection charge. Only by adding to this basically valid sewer connection charge an exemption for a small part of the class to be charged was Warren held to have exceeded its power. The function of Ordinance 61 was to remove from the sewer connection charge established in 1959 that one feature which should not have been included in the first place.

In *Beauty Built*, the Supreme Court explained the invalidity of the original Ordinance this way:

> "We conclude, therefore, that the defendant city's resolution of January 13, 1959, and the pertinent portion of ordinance No. 58, created an arbitrary and discriminatory classification of persons required to pay the sewer tap fee, contrary to the equal protection clauses of article 2, §1, Michigan Constitution (1908) and the Fourteenth Amendment to the Federal Constitution, in failing to treat equally all those persons connecting with the facility by compelling all to pay the same fees." (375 Mich. 229 at 237.)

Nowhere does the Court say that the Resolution of January 13, 1959 or Ordinance 58 is void or void ab initio. Rather it says that they "created an arbitrary and discriminatory classification of persons required to pay the sewer tap fee."

The Resolution of January 13, 1959 shows us how this classification of persons was created:

> "Whereas, it is necessary and in the best interests of the citizens of the city of Warren that all future sewer taps, which will be utilizing and consuming the treatment facilities available in our sewage treatment plant, *with the exception of structures existing of this date,* be subject to a sewer tap charge hereinafter set forth:
>
> • • • • •
>
> "Be it further resolved, that *all structures presently existing in the city of Warren that have not yet been connected to the city's sewage facilities, are hereby excepted and will not be subject to the above rates.*" (Emphasis added.)

The City of Warren thus created a sewer tap charge, and *then* added an exception for structures already existing on a certain date. The exception was in no sense an integral part of the sewer connection charge: Extending to only a small part of the total class to be charged, it was an afterthought that might as well have been added by separate legislation. And it was this exception, after all, that "created an arbitrary and discriminatory classification of persons," according to the Michigan Supreme Court.

Having learned on April 9, 1965 that its sewer connection charge Ordinance contained an invalid appendage, the City of Warren acted on April 20, 1965 to excise that appendage. If there had been an arbitrary or discriminatory classification of persons before, that condition was ended when the

Ordinance was adopted requiring *all* persons who tapped into the sewer system after January 13, 1959 to pay a fee. But the charge itself was never invalid; a fundamentally sound Ordinance was merely flawed by the illegal exemption; when the exemption was removed, the charge was restored to full effectiveness from the date it was first imposed.

The true test of whether laws will be permitted to have retrospective application is one of reason based upon the facts and public policy underlying each particular case. This point was explained long ago by this Court, speaking through Mr. Justice Holmes, in *Hudson County Water Co. v. McCarter,* 209 U.S. 349 at 355 (1908):

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line . . . are fixed by decisions that this or that concrete case falls on the nearer or farther side."

In *City of Seattle v. Kelleher,* 195 U.S. 351 (1904), this Court decided that, although original proceedings had been found invalid, the City could assess the cost of street improvements to abutting property owners under an act passed after a street paving project had been completed. Even more to the point is *Philip Wagner, Inc. v. Leser,* 239 U.S. 207 (1915). The City of Baltimore undertook a street paving program in 1906 out of general tax funds. After

it had become apparent that the funds originally raised for the program would be insufficient, the City levied in 1912 upon benefited landowners a special assessment for the cost of paving already completed. These proceeds financed the remainder of the project. The plaintiff argued that a retroactive assessment against him was a taking of property without due process of law in violation of the United States and Maryland constitutions. This Court upheld the assessment:

> "The doctrine established by this case is that a subsequent assessment may be levied because of benefits conferred by the former action of the city in improving in front of the lots assessed. As said in the Kelleher case (p. 359), 'the benefit was there on the ground at the city's expense.' So far as any Federal constitutional requirement is concerned, the State might exercise its authority to assess because of this special benefit, although that assessment was deferred for some time after the work was done at the public expense. And these considerations suggest the answer to another objection made in this connection, that it is proposed to use the assessments for paving other streets within the city. It is true that the assessments are to go into the general fund provided for such general use. *But we are unable to see how the constitutional rights of the complainant are violated, so long as there was as to it a benefit formerly conferred, and still existing, which the property had derived at public expense.* The fact that the city was authorized to use the assessment in creating a public fund, in aid of its scheme to pave other streets of the city, was a public purpose, and a legitimate one, for which the funds of the city might be used." 239 U.S. 307 at 217. (Emphasis added.)

Taking away the right a claimant would otherwise have to sue is not an unfamiliar result, even in cases that have

nothing to do with special assessments. In *Ewell v. Daggs*, 108. U.S. 143 at 151 (1883), this Court sustained repeal of a usury statute, thereby depriving Mr. Ewell of his defense to a claim for money damages:

> "[T]he right of the defendant to avoid his contract is given to him by a statute, for purposes of its own, and not because it affects the merits of his obligation. . . . The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him by subsequent legislation, the liability which he intended to incur. . . .
>
> "The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

The similarity between the setting of *Ewell* and this case is greater than one might assume. In each case, claims are made by persons who have received a bargained for benefit, and, therefore, one they are justly indebted to pay. The Respondents here, in fact, have already made their payments. As Mr. Ewell did, these Respondents are asserting "a naked legal right which it is usually unjust to insist upon." In the case decided by the U.S. Supreme Court, the benefit intended to be granted by the usury statute was stripped from the debtor; a cause of action was also destroyed here. The Respondents are, nevertheless, granted by Ordinance 61 *the benefit they were entitled to receive from the first:* A right not to pay sewer connection charges, except where all others similarly situated are required to pay.

The nature of "vested rights" is also revealed in *United States v. Heinszen & Co.*, 206 U.S. 370 (1907). The plain-

tiffs sought to recover tariff duties which had been declared unconstitutional by the Supreme Court in a previous suit. Before the action was commenced, a statute had been passed specifically ratifying the collection of the disputed tariff duty. The act was challenged on the ground that it violated the Due Process Clause by taking away a cause of action to recover the illegal duties. The Court answered with this statement:

> "It is urged that the ratifying statute cannot be given effect without violating the Fifth Amendment of the Constitution, since to give efficacy to the act would deprive the claimants of their property without due process of law, or would appropriate the same for public use without just compensation. This rests upon these two contentions: It is said that the money paid to discharge the illegally exacted duties after payment, as before, 'justly and equitably belonged to the claimants,' and that the title thereto continued in them as a vested right of property. It is consequently insisted that the right to recover the money could not be taken away without violating the Fifth Amendment, as stated. But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States, Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence from the very moment of collection a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that *the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify.*" 206 U.S. 370 at 386. (Emphasis added.)

The expression "vested rights" was originally borrowed from property law. If we must use it, though, to describe the original cause of action of the Respondents in this

action, *Heinszen* shows us that another term from property law is needed to make the definition more precise: The cause was actually "vested subject to divesture." In the instant case, the cause of action accrued when the Respondents paid sewer tap fees to the City of Warren. Yet, the cause accrued subject to the power of the City to collect sewer tap fees from the owners of the pre-existing structures, thereby eliminating the claim altogether.

The approach of the U.S. Supreme Court in all of these cases was generalized in Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 at 720 (1960):

> "The Court has tended to sustain statutes which, although retroactive in their nature, have been applied to modify a right which rests on no substantial equity. For example, an act which has the effect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the rights arose."

This Court has shown much concern for the public interest when it has been asked to review the validity of enactments of a municipal government, such as those of Warren, that have the purpose of correcting legislation to conform with the City's valid original intentions, as well as with the fair expectations of all concerned.

On the same point, Hochman states: "This principle [of *Ewell*] may also explain those cases validating statutes depriving persons of rights resulting from an unexpected interpretation given to statutes by the Supreme Court." *Id.* at 721. One such case, *Seese v. Bethlehem Steel Co.*, 168

F.2d 58 at 64 (4th Cir. 1948), speaks in terms of contract law:

> "[A]ll that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid . . . by reason of the interpretation placed by the Supreme Court upon that act; the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld."

This describes perfectly the claim of each Respondent: "Contrary to his bona fide expectations at the time he entered the transaction from which the rights arose." That decision upheld the Portal-to-Portal Act of 1947, thereby destroying an estimated five billion dollars in claims that had resulted from an unexpected construction of the Fair Labor Standards Act. While the payments of the Respondents may have been under protest, the fact remains these parties did apply for a permit and, by so doing, enter into a contract, the nature of which was only objectionable because others were not also required to contract. With this objectionable feature eliminated, its would be unjust to permit them to dishonor their contract and refuse to pay for benefits received. Respondents have no cause to complain over the terms of Ordinance 61. In fact they have realized their "vested right" to have all others pay the same charge they were required to pay.

(i-j) DOCUMENTS APPENDED

Copies of the opinions and judgments sought to be reviewed are appended hereto, also the texts of pertinent enactments of the City of Warren.

(k) RELIEF REQUESTED

The Petitioners respectfully pray that this Honorable Court grant the Petition for Writ of Certiorari to the Court of Appeals for the State of Michigan.

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Dated: April 23, 1970

APPENDIX A

STATE OF MICHIGAN

(Circuit Court—County of Macomb)

Civil Action

No. S-65-1067

Metro Homes, Inc., a Michigan corporation, Richter Construction Co., a Michigan corporation, and Seyburn Building Co., a dissolved Michigan corporation, on behalf of its shareholders, each for itself and on behalf of all other builders and persons who did apply for building permits, and did pay fees pursuant to a certain Resolution of the City of Warren, dated January 13, 1959, and/or Ordinance of the City of Warren No. 58, as amended, and/or Ordinance of the City of Warren No. 58.1, as amended,

Plaintiffs,

— vs. —

City of Warren, a Municipal corporation, its Mayor, Councilmen, Treasurer, and all other Administrative Officials having control over the financial affairs and budgets of the said City,

Defendants.

OPINION OF THE COURT

This is a motion brought by the plaintiffs, *Metro Homes Inc.*, a Michigan Corporation, requesting they be granted a summary judgment in this matter, the matter being at issue, all pleadings having been filed and the pre-trial completed. There are no material issues of fact, and the facts presented in this matter would be substantially the same as that presented in *Beauty Built Construction Cor-*

poration, et al, v. City of Warren, decided by the *Supreme Court,* 375 Mich. 229; this decision was handed down on April 9, 1965. On April 14, 1965, the instant class action was instituted; later on April 20, 1965, the defendant City of Warren, enacted Ordinance No. 61 and an application for a rehearing in the Supreme Court was filed in *Beauty Built* asserting that Ordinance No. 61 required a rehearing and reversal of the Supreme Court's decision. A rehearing was denied by the Michigan Supreme Court on May 13, 1965.

The matters at issue are the outgrowth of an Ordinance which the *City of Warren* had enacted in 1959, which Ordinance had provided in essence that plaintiffs or builders, or owners, were required to make sewer tap fee payments to the defendant *Warren* pursuant to resolutions and ordinances so passed in 1959. The Supreme Court held the Ordinance to be void and unconstitutional. The *City of Warren* claims that by passing Ordinance No. 61 on April 20, 1965, the defects inherent in the prior Ordinance which was voided by the Supreme Court had been cured, such Ordinance ostensibly taking effect as of January 13, 1959. This Ordinance retroactively imposed charges and fees applicable to buildings previously exempted from the requirement to pay sewer tap charges, which, under the Supreme Court's ruling in *Beauty Built,* constituted discrimination as to plaintiffs and voided the ordinance as to them. Plaintiffs further allege that the application for rehearing in *Beauty Built* having been denied, and that such ruling is res judicata as to *Warren* and estops it from raising, in this action, defenses which it unsuccessfully sought to raise in *Beauty Built* in its application for rehearing.

Basically, *Warren* sets forth three defenses against the claim of *Metro;* in the first place, that Ordinance 61 adopted

April 20, 1965, operated to divest the *Metro* class of its cause of action by imposing retrospective and non-discriminatory sewer tap charges beginning with all connections to the sewer system after January 13, 1959; secondly, that no discrimination was practiced by *Warren* among the members of the *Metro* class since all were placed at the same competitive disadvantage; and thirdly, that *Warren* has spent the money collected and that *Metro* class has been guilty of laches. It is the further claim of *Warren* that inasmuch as the matter for rehearing was presented to the Supreme Court at a time when the Supreme Court had arelady made its decision as to the invalidity of said Ordinance, that the position of the plaintiffs in *Beauty Built* is substantially different from that in the instant case, in that by passing Ordinance No. 61 no rights of the plaintiff in *this* case have been prejudiced by reason of such new ordinance, no judgment having been rendered in their favor as in the case of plaintiffs in *Beauty Built.* This raises some interesting questions as to the rights of the plaintiffs in this case, inasmuch as they claim they have vested rights which could not be affected by legislation or the construction of this particular ordinance which must be given prospective rather than retrospective construction, this new ordinance seeking to require payment of a sewer tap fee by those who had been expressly exempted from payment of the same in the original ordinance which was found to be unconstitutional by the Supreme Court. (The Court therein held that the exemption of such structures in the first instance was discriminatory as to the plaintiffs in *Beauty Built,* and hence unconstitutional.)

By Ordinance No. 61, defendants now claim that the unconstitutionality of said void ordinance is eliminated and that a sewer tap fee is now to be paid by all parties

who are actually using this facility. The plaintiffs answer this argument of the defendant by stating that all legislation, of whatever nature, be it an ordinance or statute passed by the State Legislature, must be given prospective rather than retrospective construction unless it is clearly demonstrated that the opposite effect was intended. In this case, it is the position of the plaintiffs that no such intention is present in the ordinance, and that it should be interpreted as applying to those who tap into the sewer system in the future, and even if it be interpreted to act retrospectively under specific terms of the ordinance, that the people of whom payment is required now are permitted to make payment in a manner different than that originally required of the plaintiffs and thus, for this reason, would be discriminatory.

It is also the position of the plaintiffs that the date chosen in Ordinance No. 61 for those who must pay a sewer tap fee beginning with connections to the sewer system after January 13, 1959, makes the ordinance plainly defective, inasmuch as the particular date was considered by the Supreme Court in *Beauty Built* and it was there determined that such date was not chosen because it formed a reasonable or rational date for establishing a division of a class, but rather a date chosen because the defendant *City* decided to begin raising additional revenues after that date.

The plaintiffs also specifically raise the point that Ordinance No. 61 is void in that it attempts to retroactively amend an unconstitutional legislative act, it being the claim of the plaintiffs that, by reason of the fact that the original act was found to be discriminatory as to the plaintiffs in *Beauty Built,* that finding the same unconstitutional stamps the same as unconstitutional ab initio, making the original

ordinances void and of no effect as of January 13, 1959, and that anything done on the subsequent ordinance to rejuvenate said original ordinance is ineffective and does not, in fact, legally accomplish such purpose.

It is the further claim of the plaintiffs that the rights which they are seeking to enforce in this particular suit are vested rights and rights to which they were entitled as of the original date of the sewer tap fees, and that they were not guilty of laches, nor did they untimely fail to seek enforcement of their rights, inasmuch as the instant suit was instituted on April 14, 1965, which was five days after the opinion in *Beauty Built* was handed down. Significant also, according to the plaintiffs, was the fact that Ordinance No. 61 was enacted by the defendant on April 20, 1965, and that a rehearing filed in the Michigan Supreme Court seeking a reversal of the Supreme Court decision in *Beauty Built,* was denied by the Supreme Court on May 13, 1965.

Plaintiffs in their motion also point out that the attempt on the part of the *City of Warren* to impose rates and charges for tapping into a sewer is really a claim in rem and cannot be used as an offset against an in personam liability which plaintiffs claim has been, and is, a vested right against the *City of Warren.*

Essentially, there are two questions to be determined, the nature of the plaintiffs' rights, that is, are they vested rights, and secondly, did Ordinance No. 61, in fact, correct the objectionable discriminatory provisions of the prior ordinances, and thus breathe new life into an ordinance which was declared unconstitutional by the Supreme Court. Other matters such as the claim that the plaintiffs are guilty of laches, by reason of which *Warren* paid out most of the money collected is not considered by this Court to

be of sufficient importance to warrant consideration at this time.

In *Beauty Built,* there cannot be much question but that the Court intended, and so stated by its terms, to declare the resolution and Ordinance No. 58-1 unconstitutional, finding it discriminatory and thus void as to the plaintiffs therein. The effect of such a finding is the subject of our present inquiry. *Cooley,* has commented in "Constitutional Limitations":

> " . . . . when a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their construction, are void; it constitutes a protection to no one who is under it, and no one can be punished for having refused obedience to it before the decision was made".

Accepting this as a major premise, did not the cause of action of the plaintiff in the instant case accrue prior to the effective date of Ordinance No. 61, and did not their right then become vested and a right to litigate their cause of action under the law become fixed and protected by constitutional guarantees? Of the many cases submitted and analyzed, nothing would seem to indicate that there is any noticeable distinction in the types of causes of action which have accrued and that all types of action, if they do accrue, whether they be for negligence or contract, or of whatever nature, cannot be wiped out by a subsequent statute, the statute being construed prospectively, and not in a manner to destroy accrued rights. *Forbes Pioneer Boat Line v. Board of Commissioners,* 42 S.Ct. 325, is the case which typically points out the correctness of plaintiffs' position. There, as in this case, the money was due when the act

(or ordinance) was passed and the legislature (or city) was not permitted to take away from a private party the right to recover such money. There, as in this case, defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. No more right can be found for saying that the promise of the law that the public forces shall be at the plaintiffs' (defendants') disposal, is left absolute, than when the claim is for goods sold, since no one would say that a claim for goods sold could be abolished without compensation.

It is the position of the plaintiffs, essentially, that *Warren* was personally liable to each and every member of the *Metro* class for the repayment of tap fees it had extracted, plus interest, and that *Warren*, essentially, seeks to interpose a liability which it created by Ordinance No. 61, and which did not exist prior thereto (April 20, 1965), that is, by using it as a defense in the instant suit brought by the plaintiffs. Plaintiffs contend that *Warren* cannot create, in 1965, a personal liability for acts done in 1959, etc., when such acts occasioned no personal liability whatsoever, when performed. The rationale behind plaintiffs' claim is that by Ordinance 61, defendant claims that Ordinance 58-1 is a valid Ordinance as of January 13, 1959, and all fees collected prior to April 20, 1965, thereunder, have been properly levied, all of which constitutes a defense to present plaintiffs' claims.

It may be said further, in reference to Ordinance No. 61, that as to the date of January 13, 1959, which was selected as a date after which payments were to be made, the Supreme Court has already commented critically, asserting that no reasonable or rational foundation was submitted to support the exemptions and classifications created by the Ordinance, as of the date of January 13, 1959, but that

it seems to have been chosen simply because it was the date defendant city decided to begin raising additional revenues.

The Ordinance itself, may also be further criticized in that the method and terms of payment differ greatly from that in the original Ordinance, and if payment is required of the plaintiffs in the instant case, it would be at a decided disadvantage to them. As a matter of fact, those structures which tapped into the sewer free of charge in prior years, cannot now be forced to pay that charge as of January 13, 1959, with interest to date, because causes of action cannot be retrospectively created.

Some question is raised as to the validation of an unconstitutional act of a legislative body. It would seem clear that the right to do so is unquestioned so long as it has application only to future operation, in order that it conform to the requirements of the constitution. *2 Mich App. 204,* as affirmed in *379 Mich 160 at 166,* confirms the general interpretation of the enactment of statutes and ordinances that is, that they are, except under unusual circumstances and express declarations, always given prospective effect and not retrospective interpretation. It is a fundamental rule of law that the legislative body must give a clear, direct, and unequivocal expression of its intent to give a statute or ordinance retroactive effect. An interpretation giving prospective effect is always to be preferred unless a purpose to give it retrospective force is expressed by clear and positive command, the occasion of the enactment admitting of no reasonable doubt, but precluding all questions as to such intention.

Inherent in this Court's consideration of the Motion for Summary Judgment is also the fact that the Supreme Court has been given an opportunity on rehearing to con-

sider the defense of Ordinance No. 61 as it applies to the plaintiffs in *Beauty Built*. While this Court does not have the benefit of the precise ruling of the Supreme Court, there is the terse comment that the rehearing has been denied. The motion for rehearing must have been submitted on the same basis proposed here in opposition to the motion for summary judgment, that is the curative and validating effect of Ordinance No. 61. It must be accepted by this Court as a matter of authority, that such situation has been given complete consideration by the Supreme Court. The one possible distinction would be the lack of identity of plaintiffs.

In *Beauty Built*, the plaintiffs had already been heard and a decision published sustaining plaintiffs' position. The new ordinance was undoubtedly enacted (eleven days later) to avoid the impact of that decision. The futility of such a move is amply demonstrated by reference to *Moser v. White*, 29 Mich 58, and *Wylie's City Commission of the City of Grand Rapids* [*sic*], 293 Mich 571. In both of these cases judgments were obtained and subsequent "curative" legislation passed to invalidate them. Such reversal of plaintiffs' judgments by legislative act could not be accomplished, said our Court.

While mutuality might be lacking, considering this as a pure res judicata matter, it would seem in this instance that the identity of issues is so complete as to require this Court to find that the matter has been previously passed upon by the Supreme Court, and is determinative of the particular defense here tendered. True, the parties plaintiff are not the same and plaintiffs in *Beauty Built* had already been favored with the decision of the Supreme Court, *Metro* says, ". . . our position is identical absent

only a judgment". Mainly, the right to refund had accrued over the same period of time. Suit for recovery was started *before* Ordinance No. 61 was passed. The same invalid (unconstitutional) Ordinance 58-1 under which payment was exacted was the only authority for requiring the payment of money for sewer tap fees. Plaintiffs contend their rights are vested rights which cannot be destroyed by subsequent legislation or as in *this* case legislation given retrospective effect to breathe life into an ordinance pronounced void and unconstitutional on grounds that the City Council created an arbitrary and discriminatory classification of persons required to pay the sewer tap fee.

Beauty Built does not merely create an obligation on Warren to collect a charge from exempted structures. It ruled the Ordinance unconstitutional and ordered a refund of a substantial sum of money to plaintiffs. It is apparent that the right to a refund was established and the obligation on Warren to pay it.

By declaring the Ordinance void, and ordering the refund, *Beauty Built* found the ordinance void ab initio and while basically such an ordinance could be valid, here (although a relatively few exemptions were created), it must be concluded that the ordinance in its entirety was void. The terse language of the Court makes that clear.

Do the plaintiffs have a vested right of which they cannot be stripped by Ordinance 61? The answer is yes. The vested right here involved is a right to recover money unconstitutionally exacted from them. *Metro* is "on all fours" with *Beauty Built*. It is no less a vested right than if all had been joined in the original *Beauty Built* suit.

It is not a vested right to have someone else pay the tap charge or to have an invalid exemption removed, or to a right to tap into the sewer free of charge as more (or less) seriously claimed by defendant. The vested right claimed by plaintiffs is a right to recover money—a real cause of action. This was the relief sought and obtained in *Beauty Built;* this is the same right claimed by *Metro* as to sewer tap fees paid under the provisions of the same void ordinance. Such a right cannot be taken away by ordinance (which, if valid, could only act prospectively to establish rights, and duties) in futuro. In *Forbes Pioneer Boat Line v. Board of Commissioners,* 42 S. Ct. 325 (US) Justice Holmes stated the situation succinctly as follows:

> "Stripped of conciliatory phrases the question is whether a State Legislature can take away from a private party a right to recover money that is due when the act is passed."

This Court has several reservations as to the constitutionality of Ordinance 61, but not wishing to add to the length or complexity of this opinion, believes that plaintiffs' motion for summary judgment should be granted, based on the pleadings filed, there being no substantial question of fact involved.

Essentially, this Court finds that the plaintiffs had a vested right to recover money based on payments for sewer tap fees exacted by defendant under Ordinance 58-1 found unconstitutional by the Michigan Supreme Court in *Beauty Built.* That by said decision the Court granted the same relief prayed for in the case at bar—the refund of tap fees paid. Thus established, was the right of *Metro* to recover money which right referred back to date of payment, a vested right, if ever one existed.

This Court further finds that the attempt by Ordinance 61 to cut off this right was wholly ineffectual. No documentation is needed to substantiate what is the accepted rule in this type of situation. The denial of a rehearing based on Ordinance 61 in *Beauty Built* (albeit plaintiffs in *Beauty Built,* relied heavily on the decision handed down in its favor prior thereto), is a clue as to how such ordinance will fare when presented as a defense in this case. This is stare decisis in, not a close case on facts, but identical. In an historical sense, there may not be mutuality of estoppel, the parties not being identical or in privity. Here, however, the issues are identical at least up to the time of the enactment of Ordinance 61. Even the issue relating to the validity of Ordinance 61 has been before the Supreme Court in *Beauty Built* on the petition for a rehearing, which was denied, whether because plaintiffs already had the decision of the Supreme Court *after which Ordinance 61 was passed,* or based on the broader reason now contended for by *Metro.* Defendant and appellee in *Beauty Built* in its brief on rehearing presented like contentions emphasizing the curative and validating effect of Ordinance 61. If we accept the denial of defendant's request for a rehearing as decisive of the issues presented by briefs of parties in *Beauty Built,* then it should be adhered to as a precedent and determinative of the issues here involved in *Metro.* Regrettable results in an individual case and notwithstanding some equitable consideration might prompt a different result, a trial court should not depart from a precedent when settled by a decision. Mutuality may be lacking, but the situation here presents a fitting set of facts for the application of the collateral estoppel doctrine.

Beauty Built did not determine that Ordinance 58-1 was a little unconstitutional or that eliminating the objection-

able matter would make matters right, or that the urgency of the immediate need for a sanitary treatment plant was the most essential factor to be kept in mind. On the contrary, the Court, without expressing any concern for these items, found the Ordinance void, based on the discriminatory provision therein, and ordered a refund of sewer tap fees paid thereunder.

The doctrine of laches, which is claimed by defendant as a good defense to this action, is not particularly important, so far as this Court is concerned. That the money was spent for the purposes intended is not questioned, and that it was necessary to do so at the time, is also not questioned, but it is true, that, what applies to the duty of a private individual to restore that which he has wrongfully taken from another, also applies to units of government. *Detroit Edison Company v. State*, 361 Mich 290, p. 292 to 293:

> ". . . 'it is a well-felt rule that "money got through imposition" may be recovered back; and as this Court has said on several occasions, "the obligation to do justice rests upon all persons natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation"'". *Ward v. Love County*, 253 US 17, (40 S Ct 419, 64 L ed 751.)

In passing, it may be said that over a number of years this matter was contested and questiond, and *Warren* possibly should have been more careful about the manner of expending the funds, except that it is a well known fact that the sewage disposal system was a critical matter in the area and the City undoubtedly elected to pro-

ceed with expenditures, knowing full well that the validity of the charges was then seriously questioned, and as a matter of fact, a case contesting same was then pending before the Supreme Court.

Plaintiffs' Motion for Summary Judgment is granted.

Alton H. Noe
Circuit Judge

Dated: February 21, 1968

OPINION OF THE COURT

In this case, pursuant to an Opinion of this Court rendered on February 21, 1968, counsel for the plaintiffs have prepared and filed a Proposed Judgment, said judgment providing that the City of Warren pay into Court, all sewer tap fees collected from the *Metro Class* plus interest from date of receipt by *Warren* to the date of payment into Court, with the exception of such sums as were paid into Court in the cause, entitled *Beauty Built Construction Corporation v. The City of Warren, County of Macomb,* Civil Action No. 32733. Included also in said Proposed Judgment is a request that the *City of Warren* be ordered to file with such payment a schedule indicating the building permit number, the name of the subdivision and lot number, the person obtaining the permit and date of payment to the *City of Warren*, and the accrued interest thereon, with respect to each sewer tap fee being paid into Court. Payment from the fund so paid, shall be made in said Proposed Judgment in accordance with further orders of the Court, and consistent with the terms of the stipulation of settlement approved and entered

into by this Court in the case of *Wheeler v. The City of Warren,* Civil Action No. S-65-1192.

Defendants' objections to the judgment as presented are principally that payment by the *City of Warren* of the sewer tap fees, illegally required as a prerequisite to building, should be made only to those who specifically filed claims therefor, and that said Judgment should not require payment into Court of *all* sewer tap fees paid to the *City of Warren.* Recalling that this is a class action instituted in behalf of all payors of sewer tap fees, plaintiffs contend that all such fees should be paid into Court regardless whether specific claims are made or not. This seems to comport with the logic of the situation, having reference to the fact that *Warren* is not entitled to any part thereof, the same being illegal exaction of fees. In *Theatre Control Corporation, et al. v. City of Detroit,* 370 Mich 382, a case was presented, which, in all respects, was identical with the case at bar. In this case the Court made an order similar to that proposed under the instant circumstances, and in that case, a large sum of money was ordered paid into Court to await further disposition.

Another objection listed by the defendant and is one of practical difficulty. This involves the filing of a schedule giving information which would identify each fee that was paid, including information listing lot number, street number, name of owner and name of payor, etc. While one can readily appreciate the practical aspects of furnishing such a schedule with over 60,000 files, the proposal still remains the same, that is, the *City of Warren* must be required to return that to which it has no legal claim and certainly no one other than the *City of Warren* should be required to bear the burden of preparing the particular schedule. Counsel for plaintiffs could probably be of much help under the circumstances if given reasonable access to

the files and records of the City of Warren, enabling them to assist in assembling the information necessary to complete the schedules.

This Court finds that the Proposed Judgment Conforms with its Opinion of February 21, 1968, and may be formally presented for signature on June 10, 1968.

Alton H. Noe
Circuit Judge

Dated: June 4, 1968

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JUDGMENT

At a session of said Court held in the Courthouse, Mt. Clemens, Macomb County, Michigan, the 10th day of June, 1968.

Present: Honorable Alton H. Noe, Circuit Judge

This Court having filed its Opinion in the above-captioned cause, which said Opinion bears date of February 21, 1968, and said Opinion having set forth the reasons for entry of a Summary Judgment for the plaintiff class, and against the defendants,

Now, Therefore,

It Is Hereby Adjudged that Judgment is entered in favor of the plaintiff class and against Warren; and

It is Hereby Adjudged that the City of Warren shall pay into this Court a sum equal to all sewer tap fees collected by Warren between January 13, 1959 and April 20 1965, with interest thereon at Five (5%) per cent per annum, from date of collection by Warren, until paid into this Court, except only such sums as shall have been paid into Court in the cause entitled: *Beauty Built Construction Co., et al v. City of Warren, et al.* in the Circuit Court for the County of Macomb, Civil Action No. 32,733 and consolidated cases. Upon payment of said sums to the County Clerk for the County of Macomb, pursuant to this Judgment, the City of Warren shall be forever discharged from any and all liability by reason of its collection of said sewer tap fees.

It is Hereby Further Adjudged that at such time or times as Warren shall make payments into this Court, in accordance with the terms hereof, Warren shall simultane-

ously file with the Court a schedule indicating the building permit number, the name of the subdivision, the lot number, the person or company obtaining the permit, the date of payment to Warren and the accrued interest thereon with respect to each sewer tap fee being paid into Court; provided, however, that in lieu of the filing of schedules from time to time, Warren may file one schedule containing all of the above information with respect to all sewer tap fees collected by Warren that have not already been paid into this Court in the case of *Beauty Built Construction Co., et al. v. City of Warren, et al.* Plaintiffs' attorneys and agents shall be afforded reasonable access to the files and records of Warren so as to enable them to verify the information contained in such schedules.

It is Hereby Further Adjudged that distribution of funds so paid in, including attorneys' fees, shall be in accordance with the further Orders of this Court and with the terms of the Stipulation of Settlement approved and entered by this Court in the case of *Wheeler et al. v. City of Warren, et al.*, Macomb Civil Action No. S-65-1192.

Alton H. Noe,
Circuit Judge.

APPENDIX B

State of Michigan—Court of Appeals

Division 2

Docket #5803

METRO HOMES, INC., a Michigan corporation, RICHTER CONSTRUCTION CO., a Michigan corporation, and SEYBURN BUILDING CO., a dissolved Michigan corporation, on behalf of its shareholders, each for itself and on behalf of all other builders and persons who did apply for building permits, and did pay fees pursuant to a certain Resolution of the City of Warren, dated January 13, 1959, and/or Ordinance of the City of Warren No. 58, as amended, and/or Ordinance of the City of Warren No. 58.1, as amended,

Plaintiff-Appellees,

v.

CITY OF WARREN, a Municipal corporation, its Mayor, Councilmen, Treasurer, and all other Administrative Officials having control over the financial affairs and budgets of the said City,

Defendants-Appellants.

Before: McGregor, P.J., Fitzgerald and Brennan, JJ.

V. J. Brennan, J.

This appeal involves a municipal corporation's effort to retain money collected under an unconstitutional resolution.

On January 13, 1959, the Warren city council created by resolution a "sewer tap charge" applicable to all subsequently built structures connected to the city's sewage system. Existing structures were exempted from the

charge, however, and certain builders thus challenged the resolution's[1] constitutionality, seeking recovery of the fees they had paid under it. This litigation culminated in the decision titled *Beauty Built Construction Corporation v. City of Warren* (1965), 375 Mich 229, wherein the Supreme Court concluded that existing but unconnected structures and structures yet to be built are alike regarding the future use of the sewage facilities, and therefore held that the 1959 resolution, by exempting the former structures from the charge, denied those persons building after January 13, 1959, equal protection of law.

On April 14, 1965, five days after the decision in *Beauty Built* was rendered, a group of builders who had paid the invalid charges, but were not parties to the *Beauty Built* suit, commenced the present class action, on behalf of themselves and all other builders similarly situated,[2] to recover the approximately five million dollars the class had paid as sewer tap charges.[3] Hoping to retain fees it had collected, the Warren city council enacted the following ordinance on April 20, 1965:

> "Section 1. There shall be paid with respect to all structures, regardless of date of construction, which, after January 13, 1959, have been or will in the future be connected to the sanitary sewage facilities of the combined water and sewer system of the City of War-

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[1] [which we will term the 1959 resolution.]

[2] [This class will be designated the *Metro* class.]

[3] While this suit was in progress below, the case of *Wheeler, et al. v. Metro Homes, Inc., et al.* was begun. The plaintiffs were a class composed of those persons who had purchased structures upon which a sewer tap charge had been paid. The defendants were the *Metro* class and the *Beauty Built* plaintiffs. The *Wheeler* class sought to recover all tap charges that the defendants might receive from the city of Warren. The plaintiff and defendant classes in *Wheeler* reached a settlement which was approved by the trial court on September 18, 1967.

ren, a sewer tap charge in the amount as provided in and in accordance with the terms of Ordinance No. 58-1 and the resolutions of January 13, 1959, and December 27, 1960, referred to in the preamble hereof, and all provisions of the said ordinance and resolutions to the contrary are hereby rescinded and repealed.

"Section 2. In all other respects the aforesaid Ordinance No. 58-1 and resolutions of January 13, 1959 and December 27, 1960, and all actions taken pursuant thereto not in conflict herewith be and the same hereby are ratified, readopted and reaffirmed."

The city of Warren then filed an application for a rehearing of *Beauty Built,* claiming that this ordinance[4] "cured" the invalid resolution. The Supreme Court denied the rehearing on May 13, 1965, and the city of Warren thereafter paid approximately $780,000 toward the *Beauty Built* claims, which, with minor exceptions, have now been satisfied.

Meanwhile, the city of Warren interposed the 1965 ordinance as a defense to this action. After issue was joined, the *Metro* plaintiffs moved for summary judgment on the ground that no material issue of fact existed and that they were entitled to a judgment in their favor as a matter of law. The trial court granted the motion and ordered the city to pay into court all fees collected from the *Metro* class. The city of Warren, along with the various officials joined in the action, appeals.

Each side presents an argument that would not require this Court to decide what effect, if any, should be given to the 1965 ordinance, if either of these arguments were dispositive, of this controversy.

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[4] [which we will term the 1965 ordinance.]

I.

The defendants urge us to follow the decision of *Seltzer v. Sterling Township* (1963), 371 Mich 214, rather than that of *Beauty Built*, and to declare the 1959 resolution valid, with or without the amendatory legislation. In *Seltzer*, the Supreme Court held to be constitutional an ordinance imposing privilege fees on certain structures connected to the water system subsequent to the adoption of the ordinance. The ordinance provided:

> "There shall be established a privilege fee for water and sewage service, which fee is to be used for capital improvements in the Sterling Township Water and Sewer System. Said fee shall be in the amount of $150.00 privilege fee for water service and $200.00 privilege fee for sewer service, such fee to be paid for each residence or building to be connected to the Sterling Township Water and Sewer System *at the time of application for a building permit.*" (Emphasis supplied.)

The defendants maintain that this valid ordinance works the same discrimination as that accomplished by the language of the 1959 resolution: The valid ordinance requires payment at the time of application for a building permit; building permits are required only for structures yet to be built; therefore structures in existence as of the effective date of the ordinance are exempt from the fee, even though they are subsequently connected. Yet, the defendants point out, the Supreme Court sanctioned this discrimination in *Seltzer:*

> "The ordinance is not limited to a class after its effect. It applies to all parties building after the effective date of the ordinance."

Whether these decisions are reconcilable or not, *Beauty Built* settles the question of the 1959 resolution's validity, for *Beauty Built* involved the same resolution, and it is not for this Court to anticipate the Supreme Court's overruling of that decision. See *Mitchell v. Metal-Assemblies, Inc.* (1966), 3 Mich. App. 143; *Abendschein v. Farrell* (1968), 11 Mich. App. 662. We must assume that the 1959 resolution is unconstitutional.

The plaintiffs argue that the denial of a rehearing in *Beauty Built* is dispositive of the question whether the 1965 ordinance is a complete defense to this action: The defendant city stressed the allegedly curative effect of the 1965 ordinance in the brief submitted with the application for a rehearing; despite the 1965 ordinance, the Supreme Court did not disturb its decision in *Beauty Built*.

Although the trial Court accepted this argument, we do not find it persuasive, since it presupposes that a denial of rehearing is determinative of the merits presented by a rehearing application, which a denial is not. See *People v. Berry* (1968), 10 Mich. App. 469; Comment, Rehearing in the Michigan Supreme Court, 12 Wayne L Rev 461 (1966). It therefore remains to be decided whether the city of Warren should be permitted to defeat the claims of the *Metro* class by its enactment of the 1965 ordinance.

II.

The defendants contend that since the invalidity and unfairness of the 1959 resolution lie exclusively in its failure to require a fee for the connection of structures standing prior to its enactment, the 1965 ordinance, by retroactively extending the fee requirement to all structures connected to the system after January 13, 1959, eliminates

the unfairness of the 1959 resolution and, consequently, the reason for recovery of the tap-in fees. In other words, it is alleged, the sewer tap charge is itself basically valid, and the exemption is merely an irregularity that has been cured. The plaintiffs, on the other hand, contend that due to its invalidity, the 1959 resolution is void *ab initio*, and that they possess a vested right to recovery. Although the plaintiffs advance little reason to explain why their cause should not be divested by the retroactive ordinance, we believe that their assertion is correct.

Considerations of due process limit the reach of retroactive legislation that would otherwise impair vested rights. *Hansen-Snyder Company v. General Motors Corp.* (1963), 371 Mich. 480; *Ramey v. Michigan Public Service Commission* (1941), 296 Mich. 449; *Briggs v. Campbell, Wyant & Cannon Foundry Co.* (1966), 2 Mich. App. 204, aff'd 379 Mich. 160 (1967). Before we turn to the considerations present here, it should be noted that the term "vested" is conclusory. Its use affords no aid to analysis and can only reflect the determination that the legislation should not be permitted to impair the interest in question. See *Wylie v. City Commission of the City of Grand Rapids* (1940), 293 Mich. 571; *Leedom v. International Brotherhood of Electrical Workers* (CA DC, 1960), 278 F2d 237.

To avoid the consequences of the 1965 ordinance's retroactive features, the defendants analogize the sewer tap charge to special assessments, which may be constitutionally levied for a public work already done. *Wagner v. Leser* (1915), 239 U.S. 207 (36 S. Ct. 66; 60 L Ed 230); *Gray v. Dingman* (1937), 279 Mich. 62. Whatever the similarity between special assessments and the charges in question, the Revenue Bond Act of 1933[4] is the source

[4] MCLA, §141.101 *et seq.* (Stat Ann 1958 Rev and Stat Ann 1969 Cum Supp §5.2731 *et seq.*)

of authority for the 1965 ordinance. This Court has had occasion in the past to consider the nature of the rates authorized by this act[4] and they are to be regarded as charges for the use of public improvement facilities and services, not as taxes. Accordingly, these charges must be sustained, if they are to be sustained at all, as charges for past acts of tapping which, due to the invalidity of the 1959 resolution, were not subject to an enforceable charge when they occurred.

Such a charge is impermissible, however, for a liability may not be imposed on account of a past act if an enforceable obligation was not occasioned when the act took place. *Forbes Pioneer Boat Line v. Board of Comm'rs.* (1922), 258 U.S. 338 (42 S Ct 325; 66 L Ed 647). This rule of due process may be subsumed under the principle that retroactive legislation may not impair vested rights. Its application is limited to those cases where it is concluded that the reason underlying the immunity from liability compels the continuance of the immunity.

> "[T]he prevailing judgment of the profession has revolted at the attempt to place immunities which

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[4] *Smith v. Township of Norton* (1965), 2 Mich App 17. There, this Court quoted with approval from Chermak, The Law of Revenue Bonds (1954):

> "Although the charges made for services rendered have been compared with special assessments levied on the property specially benefited, care should be taken that the charge made for the service is not in the nature of a special assessment which involves the power of taxation. Such charge should rest on contract for use, unless statutory requirements covering special assessment procedure are fully met. Where the charge is made solely for use, it is not a tax.
>
> "The rates, of course, must be based upon use and not special benefit or other similar criteria, unless special assessment proceedings are accepted."

exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds.

* * * * *

"[M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small. In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one, but in both classes the Courts have laid hold of a distinction between the remedy and the substantive right, or have said that 'a party has no vested right in a defense based upon an informality not affecting his substantial equities' (Cooley, Const. Lim. [6th Ed.] 454), or that 'there is no such thing as a vested right to do wrong' * * * or have called it curing an irregularity * * * or have dwelt upon the equities, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written Constitution from interfering with the power to make small repairs which a Legislature naturally would possess." *Danforth v. Groton Water Co.* (1901), 178 Mass. 472 (59 NE 1033, 1034).

The *Metro* class's immunity from liability under the 1959 resolution is not based on what might be called a technicality; and, at the same time, the class is not asserting a right to a windfall on a service for which it might otherwise be willing to pay. The 1959 resolution is invalid because it singles out the *Beauty Built* plaintiffs and *Metro* class to finance the expansion of a sewage system that others were to use also. The right to recover

the tap fees is designed to ensure that those who govern a municipality treat its citizens fairly. If municipal corporations were permitted to keep money gained in violation of constitutional principles, there would be little in the Federal and Michigan Constitutions to deter them from favoring special interests with legislation similar to that in question.

It seems to us that the 1965 ordinance not only fails to eliminate the reason for recovery, but also fails to eliminate the unfairness created by the 1959 resolution. Essential to the elimination of that unfairness is the extension of the sewer tap charge to the previously exempt structures.[6] Yet the rule preventing the city from reimposing a charge on the *Metro* structures also prohibits this extension, although the reasons underlying these two applications of the rule are different.

Retroactive legislation is often unfair because it detrimentally alters rights gained in reliance upon the prior law.[7] Thus, a person cannot be made to pay for goods or

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[6] By the city's admission, no fees have been collected for the connection of these structures.

[7] The following is from Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv L Rev 692 (1960), 696:

> "[F]rom an analysis of the cases it becomes apparent that it is impossible to reduce the potentially infinite variety of situations in which the problem of retroactivity can arise to a single common denominator. However, it is just as clear that the factor most often appearing in these cases is the extent to which the parties have laid reasonable reliance on the law existing at the time of the conduct whose legal consequences the retroactive statute would alter. The importance of this element is apparent when one considers that in very general terms the two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public interest it serves and the unfairness created by its retroactive operation, and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter."

See *Arenac County Supervisors v. Iosco County Supervisors* (1909),

services if, in accepting them, he had every reason to believe that acceptance would not incur a charge. See *Forbes Pioneer Boat Line v. Board of Comm'rs., supra.* The previously exempt structures, having been connected to the sewage system in the reasonable belief that a tap-in was free of charge, accordingly remain exempt, and it cannot be said that the 1965 ordinance rectifies the arbitrary treatment of the *Metro* class.

In passing, it should be noted that foregoing discussion in no way questions the validity of the 1965 ordinance as applied to taps made after the date of its enactment.

III.

Since the *Metro* class is entitled to a refund, it becomes necessary to decide how that end is to be accomplished. In fashioning the judgment entered below, the trial Court accepted the plaintiffs' proposal and ordered that all sewer tap fees collected from the class be paid into court, To make possible the distribution of these funds, the Court also ordered the city to furnish a schedule identifying the lots involved and the person or company having paid the fee. The defendants urge us to modify the judgment so that it requires the payment into court of only those funds for which an individual claim is filed within three to six months after notice is given by publication and registered letter. The sole reason assigned for this proposed modification is the alleged futility of raising the money necessary to satisfy the judgment, only to have substantial portions remain undistributed because certain class members are beyond the reach of notice.

We believe that the present judgment best serves the interests involved here. Regardless of the mechanics of distribution, the judgment in this class action conclusively

determines the city's liability to each member of the class. See *International Typographical Union v. County of Macomb* (1943), 306 Mich. 562. Consequently, no apparent purpose is served by making the filing of a claim a condition of recovery. The difficulty with the defendants' proposed modification is that the city should not be permitted to retain any part of the unconstitutionally gained funds.

The order granting judgment in the plaintiffs' favor is affirmed.

APPENDIX C

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 26th day of January in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable Thomas E. Brennan, Chief Justice; John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associate Justices.

On order of the Court, the delayed application for leave to appeal is considered, and the same is DENIED, for the reasons that defendants and appellants have failed to persuade the Court that they have a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 26th day of January in the year of our Lord one thousand nine hundred and seventy.

/s/ Donald F. Winters,
Clerk.

APPENDIX D

RESOLUTION

Whereas, it is necessary and in the best interests of the citizens of the City of Warren that all future sewer taps, which will be utilizing and consuming the treatment facilities available in our sewage treatment plant, with the exception of structures existing of this date, be subject to a sewer tap charge hereinafter set forth:

Now therefore, be it resolved, that all future sewer taps in the City of Warren shall be subject to the following sewer tap charge:

Single Residence	$200.00 each
Duplex, Apartments and Multiple Dwellings	200.00 per unit
Trailer Parks	200.00 per trailer

Commercial and Industrial to be based upon size of water meter, as follows:

⅝" Meter	200.00
¾"	240.00
1"	320.00
1½"	480.00
2"	640.00
3"	960.00
4"	1,280.00
6"	1,920.00
8"	2,550.00
10"	3,200.00

Be it further resolved, that all structures presently existing in the City of Warren that have not yet been connected to the city's sewage facilities, are hereby excepted and will not be subject to the above rates.

Be it further resolved, that the Water Department of the City of Warren and any and all other departments concerned with the enforcement hereof be and are hereby instructed to take any and all steps necessary to give immediate effect to this resolution.

Resolution adopted at the meeting of January 13, 1959.

/s/ Harold F. Stillwell
Secretary of the Council

CERTIFICATION

State of Michigan,
County of Macomb—ss.

I, Hildegarde M. Lowe, City Clerk of the City of Warren hereby certify that the foregoing is a true copy of the resolution adopted by the Council of the City of Warren at a meeting held on January 13, 1959.

/s/ Hildegarde M. Lowe

EXCERPTS, ORDINANCE NO. 58, TOWNSHIP OF WARREN

Section 6. Said bonds shall not be a general obligation or indebtedness of the Township of Warren, but shall be payable solely from the net revenue derived from the operation of the water and sewer system of the Township, including all appurtenances and extensions thereto; and to secure the payment of these bonds and of the Water and Sewer Revenue Refunding Bonds dated May 1, 1946, and Water and Sewer Revenue Extension and Refunding Bonds, Series B, dated May 1, 1947, the Water and Sewer Revenue Extension Bonds, Series C, dated November 1, 1947, and the Water and Sewer Revenue Bonds, Series D, dated November 1, 1949 there is hereby created a first lien upon the whole of the net revenues of the water and sewer system of the Township, including all appurtenances and extensions thereto.

Section 7. The holder or holders of said bonds or coupons representing in the aggregate not less than twenty per cent (20%) of the entire issue then outstanding may, either at law or in equity, by suit, action, mandamus or other proceedings, protect and enforce the statutory lien upon the revenues of the said water and sewer system, including appurtenances and extensions thereto, and may, by suit, action, mandamus or other proceedings, enforce and compel performance of all duties of the officers of the Township, including the fixing of sufficient rates, the collection of revenues, the proper segregation of the revenues of the system, includinng appurtenances and extensions thereto, and the proper application thereof; Provided, However, that said statutory lien upon said revenues shall not be construed to give such holder or holders

of any bonds or coupons authority to compel the sale of said system.

If there be any default in the payment of the principal of or interest on any of said bonds, any court having jurisdiction in any suit or action may appoint a receiver to administer and operate said system, including appurtenances and extensions thereto, on behalf of said Township, and under the direction of such court, and by and with the approval of such court, to fix and charge rates and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against said system and for the payment of the expenses of operating and maintaining the same and to apply the income and revenue of said system in conformity with Act 94, Public Acts of Michigan, 1933, as amended. The holder or holders of any such bonds or any coupon there from shall have all other rights and remedies given by said Act 94, Public Acts of Michigan, 1933, as amended, for the collection and enforcement of said bonds and the security therefor.

Section 8. The schedule of rates for water and sewer service supplied by the water and sewer system of the Township in effect in the Township on the date of the adoption of this Ordinance shall be regarded as the initial schedule of rates for the purposes of this Ordinance, but shall be subject to such increase and revision from time to time as may be necessary to carry out the provisions of this Ordinance.

The charges for water and sewer service which are, under the provisions of Section 21 of Act 94, Public Acts of Michigan, 1933, as amended, made a lien on all premises served thereby, unless notice is given that the tenant is responsible, are hereby recognized to constitute such lien

and whenever any such charge against any piece of property shall be delinquent for six (6) months, the official in charge of the collection thereof, shall, on or before June 1st of each year, certify to the Township Supervisor the fact of such delinquency, whereupon such charge shall be entered on the next tax-roll as a charge against such premises and the lien thereof enforced in the same manner as general township taxes against such premises are collected and the lien thereof enforced: Provided, However, where notice is given that a tenant is responsible for such charges and service as provided by said Section 21, no further service shall be rendered such premises until a cash deposit equal to the estimated amount of the next ensuing six (6) months bill shall have been made as security for payment of such charges and service.

The Township Board may require advance deposits in such other cases as it deems advisable or necessary.

In addition to other remedies provided, the Township shall have the right to shut-off and discontinue the supply of water to any premises for the nonpayment of water or sewer charges when due. Such water service shall be discontinued to any premises whenever any water or sewer charges are delinquent and unpaid thirty (30) days after the due date thereof, and such service shall not be restored until such delinquent charges are paid in full plus a turn-on charge of $1.50.

Section 9. The rates so fixed are estimated to be sufficient to provide for the payment of the interest on and the principal of all bonds issued hereunder, and when the same become due and payable to create a bond and interest redemption fund for said bonds, to provide for the payment of the expenses of administration and such ex-

penses for maintenance of said water and sewer system as are necessary to preserve the same in good repair and working order, to build up a reasonable reserve for depreciation, and to build up a reserve for reasonable and proper improvements, betterments and extensions thereto other than those necessary to maintain the same in good repair and working order. Such rates shall be fixed and revised from time to time as may be necessary to produce these amounts, and it is hereby covenanted and agreed at all times to fix and maintain such rates for service furnished by said water and sewer system as shall be sufficient to provide for the foregoing.

Section 10. The Township Board may make such rules, regulations and by-laws governing the operation of said water and sewer system and the collection of the service rates as it shall deem necessary, and for the management and protection of said water and sewer system. Such rules, regulations and by-laws shall have the same force and effect as Ordinances.

Section 11. The said water and sewer system shall be operated on the basis of a fiscal year commencing on January 1st and ending on December 31st.

Section 12. The Township Board, at the first of each fiscal year, shall adopt a budget for said water and sewer system. The gross revenues of said water and sewer system, including all appurtenances and extensions thereto, are hereby pledged and ordered to be set aside in a Receiving Fund, and distributed monthly or oftener into separate funds, as follows:

(A) OPERATION AND MAINTENANCE FUND:

There shall first be set aside, out of the revenues in the Receiving Fund, and transferred to the Operation and Maintenance Fund, amounts estimated to be sufficient for the

payment of the current expenses of operation, administration and maintenance of said water and sewer system during the current and next succeeding month.

(B) BOND AND INTEREST REDEMPTION FUND:

There shall next be established and maintained, a Bond and Interest Redemption Fund, which shall be used solely and only for the purpose of paying the principal of and interest on the outstanding Water and Sewer Revenue Bonds dated May 1, 1946, the Water and Sewer Revenue Extension and Refunding Bonds, Series B, dated May 1, 1947, the Water and Sewer Revenue Extension Bonds, Series C, dated November 1, 1947, and the Water and Sewer Revenue Bonds, Series D, dated November 1, 1949, and on the bonds hereby authorized. During each month, out of the Receiving Fund, after providing for the Operation and Maintenance Fund, there shall be set apart and transferred into the Bond and Interest Redemption Fund a sum equal to one-twelfth (1/12th) of the total amount of principal and interest falling due during the next twelve months. If, in any operating year, the amount in the Bond and Interest Redemption Fund shall be insufficient to pay the principal and interest of bonds falling due during such year, the amount of such deficiency shall be transferred to said fund during the following year, in addition to the requirements of such year, after setting aside the Operation and Maintenance Fund. There shall also be set aside and transferred into said fund during each fiscal year, an amount equal to twenty per cent (20%) of the interest and principal falling due during the next fiscal year until a reserve is accumulated equal to the interest and principal falling due during the following twelve months. Such reserve shall be held in the Bond and Interest Redemption Fund and used solely for the payment of principal

and interest on said bonds if current revenues shall be insufficient: Provided, However, that no further payments need be made into said Bond and Interest Redemption Fund after enough of the bonds have been retired so that the amount then held in said Bond and Interest Redemption Fund (including such reserve) is equal to the entire amount of interest and principal which will be payable at the time of maturity of all the bonds then remaining outstanding. If at any time the reserve after December 31, 1956, shall fall below the amount of principal and interest falling due during the next twelve months, all the revenues remaining after payment of operating expenses shall be paid into the Bond and Interest Redemption Fund, and so much thereof as may not be required for payment of principal and interest falling due shall be placed in said reserve until said reserve shall reach the full amount hereby provided.

(C) DEPRECIATION FUND:

Out of the remaining revenues in the Receiving Fund, there shall be set aside and transferred to the Depreciation Fund, such sums as the Township Board shall deem sufficient, not exceediing Five Thousand ($5,000.00) Dollars in any one year, and not exceeding a total amount of Fifty Thousand ($50,000) Dollars at any time, to build up a reasonable reserve for depreciation of the system. Such reserve shall be kept as cash in bank or invested in bonds of the United States of America.

(D) CONTINGENT FUND:

Out of the remaining revenues in the Receiving Fund, there shall next be set aside and transferred to the Contingent Fund, such sums as the Township Board may deem sufficient, not exceeding Five Thousand ($5,000.00) Dollars in any one year; to build up a reserve for reasonable

and proper improvements, betterments and extensions to the system. Such reserves shall be kept as cash in bank or invested in bonds of the United States of America.

SURPLUS:

Any surplus revenues not otherwise appropriated by this Ordinance shall be transferred, first, to the Operation and Maintenance Fund, and second, to the Bond and Interest Redemption Fund, if necessary to provide for the current requirements thereof, and if not so required, may be transferred to either of said funds or may be used for retirement of callable bonds or for future extensions and improvements.

Section 13. The gross revenues derived from the operation of the water and sewer system, except the Bond and Interest Redemption Fund, shall be deposited in The Community Bank, Warren, Michigan, or in the National Bank of Detroit, Michigan. The moneys of each fund shall be kept in a separate bank account. In case neither bank will accept any such deposits, the deposits not accepted shall be made in a bank in the State of Michigan which is a member of the Federal Reserve System, to be designated by the Township Board.

Section 14. The Bond and Interest Redemption Fund shall be kept on deposit at Detroit Trust Company, Detroit, Michigan, which is hereby appointed as Trustee of such Fund. In case Detroit Trust Company shall at any time be unable or unwilling to hold such fund as Trustee, the Township Board shall appoint as successor in trust, and as paying agent of said bonds, a bank in the State of Michigan having trust powers. If, at any time after the reserve described in Section 12 (B) hereof shall have reached the required amount of principal and interest maturing in the next twelve months, it shall fall below that

standard, it shall be the duty of said Detroit Trust Company, or its successor agent, to notify the Townhip Clerk by registered mail of such deficiency. The Detroit Trust Company or its successor paying agent shall cause such notice to be published in the Michigan Investor, or in case that paper shall have been discontinued, then in some other paper circulated in the State of Michigan which carries, as part of its regular service notices of sale of municipal bonds. On receipt of such notice by the Township Clerk, it shall be the duty of the Township Board forthwith to increase the rates for water, sewer service and hydrant rental sufficiently to produce within the current year revenues sufficient to cover the deficiency in said reserve as reported in said notice.

Section 15. The Township Board reserves the right to issue additional bonds of equal standing and priority with the bonds hereby authorized, for extensions and improvements to said system, when the revenues of the preceding fiscal year, after payment of operating expenses, shall equal 110% of the combined average annual requirements for principal and interest of all bonds of this issue outstanding and any additional bonds that may have been issued pursuant to this Section, together with the additional bonds so to be issued, or upon the written consent of the holders of 75% of the Water and Sewer Revenue Bonds then outstanding.

ORDINANCE NO. 58-1

AN ORDINANCE TO AMEND SECTION 12 OF ORDINANCE NO. 58 OF THE ORDINANCES OF THE CITY OF WARREN.

THE CITY OF WARREN ORDAINS:

SECTION 1. That Section 12 of Ordinance No. 58 of the ordinances of the City of Warren, be amended to read as follows:

12. The gross revenues of the combined water and sewer system shall be set aside, as collected, and deposited in a separate depositary account in the Bank of Commerce, Centerline Branch, of Centerline, Michigan, a bank duly qualified to do business in Michigan, in an account to be designated WATER AND SEWER SYSTEM RECEIVING FUND (hereinafter, for brevity, referred to as the "Receiving Fund"), and said revenues so deposited are pledged for the purpose of the following funds and shall be transferred from the Receiving Fund periodically in the manner and at the times hereinafter specified, provided, however, that all gross revenues received from the imposition of the rate designated as "sewer tap charge" under the provisions of a resolution adopted by the City Council on January 13, 1959, shall be allocated as a separate account on the books and records of the City, and said moneys shall not be transferred as herein required to the Operation and Maintenance Fund, Bond and Interest Redemption Fund, or Replacement Fund, except to the extent that the other revenues in the Receiving Fund are not sufficient to meet the requirements hereinafter established for said funds:

(A) OPERATION AND MAINTENANCE FUND:

There shall first be set aside, out of the revenues in the Receiving Fund, and transferred to the Operation and Maintenance Fund, amounts estimated to be sufficient for the payment of the current expenses of operation, administration and maintenance of said water and sewer system during the current and next succeeding month.

(B) BOND AND INTEREST REDEMPTION FUND:

There shall next be established and maintained a separate depositary account, designated as the Bond and Interest Redemption Fund, the moneys on deposit therein from time to time to be used solely for the purpose of paying the principal of and interest on all bonds payable out of the revenues of the water and sewer system. During each month, out of the Receiving Fund, after providing for the Operation and Maintenance Fund, there shall be set apart and transferred into the Bond and Interest Redemption Fund a sum equal to one-twelfth (1/12th) of the total amount of principal and interest falling due during the next twelve months. If, in any operating year, the amount in the Bond and Interest Redemption Fund shall be insufficient to pay the principal and interest of bonds falling due during such year, the amount of such deficiency shall be transferred to said fund during the following year, in addition to the requirements of such year, after setting aside the Operation and Maintenance Fund. There shall also be set aside and transferred into said fund during each fiscal year, an amount equal to twenty per cent (20%) of the interest and principal falling due during the next fiscal year until a reserve is accumulated equal to the interest and

principal falling due during the following twelve (12) months. Such reserve shall be held in the Bond and Interest Redemption Fund and used solely for the payment of principal and interest on said bonds if current revenues shall be insufficient: Provided, however, that no further payments need be made into said Bond and Interest Redemption Fund after enough of the bonds have been retired so that the amount then held in said Bond and Interest Redemption Fund (including such reserve) is equal to the entire amount of interest and principal which will be payable at the time of maturity of all the bonds then remaining outstanding. If at any time the reserve after December 31, 1956, shall fall below the amount of principal and interest falling due during the next twelve (12) months, all the revenues remaining after payment of operating expenses shall be paid into the Bond and Interest Redemption Fund, and so much thereof as may not be required for payment of principal and interest falling due shall be placed in said reserve until said reserve shall reach the full amount hereby provided.

(C) REPLACEMENT FUND:

There shall next be established and maintained a separate depositary account designated as the Replacement Fund, the moneys from time to time on deposit therein to be used solely for the purpose of making major repairs and replacements to the water and sewer system. There shall immediately be deposited into said Replacement Fund all moneys now on deposit in the Depreciation Fund heretofore established under the provisions of said Ordinance No. 58, and the additional sum of Six Thousand Dollars ($6,000.00) per year, payable in equal monthly installments, after providing for all requirements of the Operation and

Maintenance Fund and the Bond and Interest Redemption Fund until the moneys in said Replacement Fund total Eighty Thousand Dollars ($80,000.00). If at any time it shall be necessary to use moneys in said Fund for such purpose, the moneys so used shall be replaced from the net revenues in the Receiving Fund which are not required by this Ordinance to be used for the Operation and Maintenance Fund, or the Bond and Interest Redemption Fund.

(D) SEWAGE TREATMENT PLANT IMPROVEMENT FUND:

There shall next be established and maintained a separate depositary account designated as the Sewage Treatment Plant Improvement Fund, the moneys from time to time on deposit in said Fund to be used for the purpose of constructing additions and improvements to the sewage treatment plant of the City, in order to make it adequate to properly treat the sewage of the City up to the full development of the City, as estimated by the consulting engineers. All moneys allocated upon the books and records of the City derived from the rate designated as "sewer tap fee," and not used to meet the current requirements of the preceding funds, shall be deposited into this Fund monthly, until such time as sufficient funds have been accumulated therein to provide for the construction of said additions and improvements to the sewage treatment plant in accordance with the written estimates of cost prepared by the consulting engineers and filed with the City Clerk.

(E) IMPROVEMENT FUND:

There shall next be established and maintained a separate depositary account designated Improvement Fund, the moneys from time to time on deposit in said Fund to be used for the purpose of making additional improvements, extensions and additions to the water and sewer system. There shall immediately be deposited into said Improvement Fund all moneys now on deposit in the Contingent Fund heretofore established under the provisions of said Ordinance No. 58, and such additional moneys after providing for the foregoing requirements, as the City Council shall determine.

(F) SURPLUS:

Any surplus revenues not otherwise appropriated by this Ordinance shall be transferred, first, to the Operation and Maintenance Fund, and second, to the Bond and Interest Redemption Fund, if necessary to provide for the current requirements thereof, and if not so required, may be transferred to either of said funds or may be used for retirement of callable bonds, or for future extensions and improvements.

SECTION 2. All other provisions of Ordinance No. 58 shall remain in full force and effect.

SECTION 3. This ordinance shall take effect on January 9, 1961.

I HEREBY CERTIFY that the foregoing Ordinance No. 58-1 was adopted at a meeting of the Warren City Council held on December 20, 1960.

James D. Gray,
City Clerk.

ORDINANCE NO. 61

WHEREAS, the City Council did, on January 13, 1959, adopt a resolution establishing a sewer tap charge to be paid with respect to all structures except those existing on that date upon the connection of each such structure to the sanitary sewage facilities of the combined water and sewer system of the City;

AND WHEREAS, the City Council did, on December 20, 1960, adopt Ordinance No. 58-1 for the purpose of formalizing, in accordance with the mandatory provisions of Act No. 94, Public Acts of Michigan, 1933, as amended, the Michigan Revenue Bond Act, and existing City Revenue Bond Ordinances, procedures for accounting for the collections of said sewer tap charge as a portion of the revenues of said combined system;

AND WHEREAS, the City Council did, on December 27, 1960, adopt a resolution ratifying and confirming the terms of the aforesaid resolution of January 13, 1959 and Ordinance No. 58-1;

AND WHEREAS, approximately seventy-five per cent (75%) of all collections under the aforesaid sewer tap charge to March 31, 1965 have been expended for extensions and improvements to the sewage treatment plant and other sewage facilities of said system, and the balance of said collections, together with anticipated future collections, has presently been programmed for the payment of a part of the costs of the City's 1965 sewer improvement projects;

AND WHEREAS, it is the determination of the City Council that the continued imposition of said sewer tap charge and the use of the collections thereof for improvements to the sewer facilities of the aforesaid system are vitally necessary to the public health, safety and welfare of the City;

AND WHEREAS the Supreme Court of the State of Michigan has decided, on April 9, 1965, in the case of *Beauty Built Construction Corp., et al v. City of Warren, et al.*, that said sewer tap charge may not be imposed since the aforesaid ordinance and resolutions of the City Council have "created an arbitrary and discriminatory classification of persons required to pay the sewer tap fee, contrary to the equal protection clauses of article 2, §1, Michigan Constitution (1908) and the Fourteenth Amendment to the Federal Constitution, in failing to treat equally all those persons connecting with the facility by compelling all to pay the same fees."

NOW, THEREFORE, THE CITY OF WARREN ORDAINS:

Section 1. There shall be paid with respect to all structures, regardless of date of construction, which, after January 13, 1959, have been or will in the future be connected to the sanitary sewage facilities of the combined water and sewer system of the City of Warren, a sewer tap charge in the amount as provided in and in accordance with the terms of Ordinance No. 58-1 and the resolutions of January 13, 1959, and December 27, 1960, referred to in the preamble hereof, and all provisions of the said ordinance and resolutions to the contrary are hereby rescinded and repealed; Provided, However, that structures which on the effective date of this ordinance have been tapped into said sanitary sewage facilities with-

out payment of said sewer tap charge, by virtue of the exemption rescinded and repealed hereby, shall have the option of payment of said charge either in cash at the time of payment of the quarterly water and sewer billing next falling due to said premises after the effective date of this ordinance, or in forty (40) equal installments as a part of the forty (40) next succeeding quarterly water and sewer billings to said premises, commencing with the first such billing falling due after the effective date of this Ordinance, in the latter instance with interest at the rate of one per cent (1%) quarterly on the full unpaid balance of said charge added to each such installment.

Section 2. In all other respects the aforesaid Ordinance No. 58-1 and resolutions of January 13, 1959 and December 27, 1960, and all actions taken pursuant thereto not in conflict herewith be and the same hereby are ratified, readopted and reaffirmed.

Section 3. If any section, paragraph, clause or provision of this Ordinance shall be held invalid, the invalidity of such paragraph, section, clause or provision shall not affect any of the other provisions of this Ordinance.

Section 4. This Ordinance shall be published in full in the Macomb Daily, Warren, Michigan, a newspaper of general circulation in the City of Warren, within ten (10) days after its adoption and the same shall be recorded in the Ordinance Book of the City and such recording authenticated by the signatures of the Mayor and City Clerk.

Section 5. This Ordinance shall become effective immediately upon its passage.

OPPOSITION BRIEF

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FILED
MAY 28 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1515

METRO HOMES INC., a Michigan corporation, RICHTER CONSTRUCTION CO., a Michigan corporation, and SEYBURN BUILDING CO., a dissolved Michigan corporation, on behalf of its shareholders, each for itself and on behalf of all other builders and persons who did apply for building permits, and did pay fees pursuant to a certain Resolution of the City of Warren dated January 13, 1959, and/or Ordinance of the City of Warren No. 58, as amended, and/or Ordinance of the City of Warren No. 58.1, as amended,
Respondents,

v.

CITY OF WARREN, a Municipal corporation, its Mayor, Councilmen, Treasurer, and all other Administrative Officials having control over the financial affairs and budgets of the said City,
Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

(For List of Attorneys, see Inside Front Cover)

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Respondents do not accept petitioners' statement of questions and submit that the questions presented are as follows:

I. QUESTIONS ON THIS COURT'S JURISDICTION AND DISCRETIONARY ISSUANCE OF THE WRIT:

(a) Where a municipal ordinance is held to be unconstitutional for violation of both the Michigan and United States Constitutions, does this Court have jurisdiction under 28 U.S.C. 1257 (3) to review such ruling?

(b) Where a municipal ordinance is held to be unconstitutional in a *1965* Michigan decision (*Beauty Built, et al v. Warren,* 375 Mich. 229 (1965), reh. den. May 13, 1965), does this Court have jurisdiction to issue a Writ of Certiorari upon a 1970 request made by the defendant in that litigation who now seeks review and reversal of that decision?

(c) Is a question of national significance presented by a Michigan ruling which considers Michigan common law and Michigan Constitutional decisions and concludes that a Michigan municipal ordinance violates the Michigan Constitution?

II. QUESTIONS ON THE MERITS:

(a) When an owner of a building connects into a municipal sewer system at a time when such connection is lawful and there is no special charge imposed for the making of such connection, can the municipality years later retroactively create and impose a special charge for the making of that connection?

(b) Where the respondent Metro class had been required to pay a sewer tap fee to Warren which fee was ruled to be unconstitutional under the Michigan and United States Constitutions, did the members of the class have a vested right to recover such fees?

(c) Where a municipal ordinance enacted April 20, 1965 imposes a retroactive tapping charge for all sewer connections made after January 13, 1959, does such ordinance create arbitrary and unreasonable classifications and distinctions violative of Article I, Sections 1 and 2 of the Michigan Constitution (1963) and the Fourteenth Amendment to the United States Constitution when

(i) the class boundary line date of January 13, 1959 has previously been ruled to be an arbitrary and unreasonable date by the Michigan Supreme Court;

(ii) some property owners are permitted to pay the tap fee, without interest, years after the connection was made while the Metro class is not;

(iii) some owners are permitted to pay the tap fee in long term installments at very low interest rates (4% per annum) while the Metro class is not; and

(iv) the tap fee is actually enforced against, and legally applicable to, only a classification of owners that has already been ruled to be unconstitutionally created?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1515

METRO HOMES INC., a Michigan corporation, RICHTER CONSTRUCTION CO., a Michigan corporation, and SEYBURN BUILDING CO., a dissolved Michigan corporation, on behalf of its shareholders, each for itself and on behalf of all other builders and persons who did apply for building permits, and did pay fees pursuant to a certain Resolution of the City of Warren dated January 13, 1959, and/or Ordinance of the City of Warren No. 58, as amended, and/or Ordinance of the City of Warren No. 58.1, as amended,
Respondents,

v.

CITY OF WARREN, a Municipal corporation, its Mayor, Councilmen, Treasurer, and all other Administrative Officials having control over the financial affairs and budgets of the said City,
Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the Petition for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the State of Michigan, entered in the above cause on October 29, 1969, be denied.

COUNTER-STATEMENT OF FACTS

Petitioners' (hereinafter called Warren) Statement of Facts is inaccurate in several particulars and does not adequately inform the Court of the factual background of this matter. Accordingly, Respondents (hereinafter called the Metro class) submit the following Counter-Statement of Facts which begins, as it must, with a brief history of the earlier case of *Beauty Built v. Warren, et al.*, 375 Mich. 229 (1965), reh. denied May 13, 1965.

A. THE BEAUTY BUILT CASE

On January 13, 1959, Warren adopted a resolution (hereinafter called the 1959 Resolution; Petition, pp 53-54) which imposed a sewer tap charge upon all structures thereafter *constructed* in the City. That charge was payable in full at the time a building permit was obtained. Numerous structures existed in the City at that time which had not yet tapped into the sewer system. Such existing but untapped structures were expressly exempted from the charge and at least 1661 of such exempted structures tapped in between January 13, 1959 and April 9, 1965 (the date the charge was held unconstitutional by the Michigan

Supreme Court) without being required to pay the tap charge. In addition, there were literally thousands of structures already existing *and* tapped in on January 13, 1959. No sewer tap fee was required from any of such structures.

Collection of the tap charge was handled through the Warren Building Department and no building permits for new construction were issued after January 13, 1959 unless the applicant paid the tap charge. The charge ranged from a flat $200.00 per residential unit through a graduated scale for commercial and industrial structures culminating in a $3,200.00 charge for a ten inch meter. The tap charge was in addition to the normal connection and inspection fee paid to cover the cost of making connections to the sewer.

In September 1960, some seventeen plaintiffs who had been required to pay the tap charge filed separate suits against Warren in Macomb County Circuit Court seeking to have the tap charge collections returned. The cases were all factually identical and were consolidated at a combined pre-trial hearing on November 14, 1961. The litigation thereafter continued in the name of one of the plaintiffs, Beauty Built Construction Corp. (these plaintiffs will hereinafter be referred to collectively as the Beauty Built paintiffs).

The trial court in *Beauty Built* upheld the validity of the sewer tap charge and an appeal to the Michigan Supreme Court was taken by the Beauty Built plaintiffs. On April 9, 1965, the Supreme Court reversed the trial Court and held that:

> "[Warren's] resolution of January 13, 1959, and the pertinent portion of ordinance No. 58, created an arbitrary and discriminatory classification of persons required to pay the sewer tap fee, contrary to the equal protection clauses of article 2,

> §1, Michigan Constitution (1908) and the Fourteenth Amendment, to the Federal Constitution in failing to treat equally all those persons connecting with the facility by compelling all to pay the same fees.''
>
> (*Beauty Built*, 375 Mich. 229 at 237)

Eleven days later, on April 20, 1965, Warren enacted Ordinance No. 61. (This ordinance is set out in full at pages 68-70 of Warren's Petition and is hereafter referred to as the 1965 Ordinance.) Immediately thereafter Warren filed an application and brief in the Michigan Supreme Court seeking a rehearing and reversal of *Beauty Built* on the sole ground that the 1965 Ordinance had allegedly "cured" the unconstitutionality of the 1959 Resolution. The Michigan Supreme Court denied rehearing on May 13, 1965. Counsel for Warren in the instant case were also counsel for Warren in *Beauty Built*. Counsel for the Metro class were also counsel for the Beauty Built plaintiffs. Warren did not attempt any further appeals from the Michigan Supreme Court's opinion in *Beauty Built* nor from its denial of a rehearing thereon.

Warren thereafter paid some $780,000.00 into Macomb Circuit Court towards satisfaction of the claims of the Beauty Built plaintiffs. With the exception of a few claims still being negotiated, this was the total amount claimed by the Beauty Built plaintiffs.

On April 14, 1965, five days after the Michigan Supreme Court's *Beauty Built* decision, and six days prior to the enactment of the 1965 Ordinance, the instant case (the *Metro* case) was started.

B. THE METRO CASE

Unlike *Beauty Built, Metro* is a class action. The Metro class is composed of all those persons and companies who paid the sewer tap fee to Warren prior to Warren's adoption of the 1965 Ordinance but who were not parties to the *Beauty Built* case. All such persons and companies, together with the Beauty Built plaintiffs, comprise the classification of persons and companies which the Michigan Supreme Court held in *Beauty Built* was unconstitutionally required to pay the sewer tap fee. Any member of the Metro class could have been a Beauty Built plaintiff, and vice versa. The legal position of each claimant in *Metro* and in *Beauty Built* with respect to payment of the tap charge is identical. It should further be noted that the Metro class is not composed simply of builders as Warren claims. Many of the class members are professional builders but the class is actually composed of those who paid the unconstitutional tap fee. In many cases the class member is an owner of property who purchased his own building permit (be it residential, commercial or industrial) rather than the builder who might have been employed by such owner as a general contractor for the actual construction.

Warren's main defense in *Metro* was that the 1965 Ordinance had "cured" the unconstitutionality of the 1959 Recolution. After issue in *Metro* was joined, a motion for summary judgment was filed on behalf of the Metro class on the ground that no material issue of fact existed and plaintiffs were entitled to judgment as a matter of law. The matter was submitted on briefs and the trial court rendered its decision on February 21, 1968, granting the summary judgment (Opinion at pp 23-38 of Petition).

C. THE RULINGS BELOW

In *Beauty Built*, the Michigan Supreme Court stated the issue before it as follows:

> "The principal question we consider on appeal is whether the resolution of January 13, 1959, created an arbitrary and discriminatory classification of persons required to pay the sewer tap fee contrary to the equal protection clauses of article 2, §1, Michigan Constitution (1908) and the Fourteenth Amendment to the Federal Constitution."
>
> (375 Mich. at 234)

The *Beauty Built* court ruled that the 1959 Resolution was unconstitutional in that it

> ". . . created an arbitrary and discriminatory classification of persons required to pay the sewer tap fee, contrary to the equal protection clauses of article 2, §1, Michigan Constitution (1908) and the Fourteenth Amendment to the Federal Constitution, in failing to treat equally all those persons connecting with the facility by compelling all to pay the same fees."
>
> (375 Mich. at 237)

Article II, §1 of the Michigan Constitution (1908) states

> "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."

In the revised Michigan Constitution of 1963 (applicable to the 1965 Ordinance) it is provided that

> "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Article I, Section 1.

> "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation." Article I, Section 2.

Among other things, the trial court in *Metro* held that (Petition, Appendix A, pp. 23-36)

1. The Michigan Supreme Court's ruling in *Beauty Built* was controlling on the unconstitutionality of the 1959 Resolution.

2. The Metro class had a vested right to recover the sewer tap fees unconstitutionally extracted from them.

3. Warren lacked the power to create, by the 1965 Ordinance, a retroactive cause of action in favor of itself for sewer tap fees relating to sewer connections made between 1959 and 1965 where no obligation existed between 1959 and 1965 to pay such fees.

4. The 1965 Ordinance, in and of itself, created arbitrary and discriminatory classifications and distinctions in violation of the Michigan and Federal Constitutions.

The Court of Appeals, in affirming the *Metro* trial court's ruling, (Petition, Appendix B, pp. 41-51), discussed and agreed with the trial court's opinion on points 1, 2 and 3 above. Point 4 of the trial court's ruling was not necessary to the decision and was not discussed. Specifically, and in addition to holding that Michigan law established and protected the vested rights of the Metro class, the Court of Appeals stated:

> "It seems to us that the 1965 ordinance not only fails to eliminate the reason for recovery, but also fails to eliminate the unfairness created by the 1959

> resolution." (19 Mich. App. 664, 673; Petition, Appendix B, at p. 49)

That "unfairness", present in both the 1959 Resolution and the 1965 Ordinance, was the "unfairness" which caused the *Beauty Built* Court to rule that the equal protection clauses of *both* the Michigan and Federal Constitution had been violated.

Warren sought leave to appeal *Metro* to the Michigan Supreme Court and, at the same time, invited the Michigan Supreme Court to take the opportunity to reverse or otherwise overrule its *Beauty Built* decision.

The Michigan Supreme Court unanimously denied leave to appeal, ruling that:

> "On order of the Court, the delayed application for leave to appeal is considered, and the same is DENIED, for the reasons that defendants and appellants have failed to persuade the Court that they have a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous." (383 Mich. 761 (noted) (Petition, Appendix C. p. 52)

ARGUMENT

INTRODUCTION TO ARGUMENT

Despite Warren's oft-repeated assertions to the contrary, *Beauty Built* did *not* rule that the fee was "basically valid" nor did that Court merely strike from the 1959 Resolution a so-called "invalid appendage" as claimed by Warren. The City had deliberately and precisely discriminated against the Beauty Built plaintiffs (and the Metro class) and had defended its right so to act for over six years. It was obviously beyond the function (and power) of the Michigan Supreme Court to rewrite the 1959 Resolution for Warren or to impose liability upon those expressly exempted from liability by the terms of that Resolution. Instead, the Michigan Supreme Court quite properly and clearly ruled that the 1959 Resolution, and that portion of Warren Ordinance No. 58 which subsequently codified the Resolution, were substantively unconstitutional because they violated the Michigan and Federal Constitutions.

Indeed, the enactment by Warren of this co-called "basically valid" resolution resulted in liability being imposed upon Warren of over $780,000.00 in *Beauty Built*. With the exception of some claims still being negotiated, this was the *total* amount involved in *Beauty Built*. Had more members of the Metro class joined the Beauty Built plaintiffs, the recovery could have been $2,000,000.00, $3,000,000.00, etc.—recovery was limited only by the total amount claimed. How can this be if the sewer tap fee were "basically valid" or if the Court merely struck down an "invalid appendage". The answer is that a sewer tap fee, *in general,* is constitutional. Warren's sewer tap fee, *in particular,* was substantively and fundamentally unconstitutional.

We now proceed to show that this Court should not grant Certiorari in this matter because (a) Certiorari is not procedurally proper and (b) the rulings below were correct.

I. THIS COURT LACKS JURISDICTION

Warren's Petition simply asserts, without citation to or support from the record, that the Fourteenth Amendment to the Federal Constitution is "involved". (Petition, p 4) No further explanation is offered and under the actual circumstances presented, it appears that this Court lacks jurisdiction to grant the Writ sought.

This Court's jurisdiction is found in 28 U.S.C. 1257. In pertinent part, that statute provides that

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(3) By writ of certiorari, where the validity of a . . . State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, . . ." (28 U.S.C. 1257(3))

This Court has previously interpreted this statutory grant of jurisdiction, and has established the following guidelines:

> ". . . the settled rule [is] that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corporation v. Muller* (1935), 296 U.S. 207, 210; 56 S.Ct. 183, 184.

Similarly:

> "An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that case relied on the State Constitution alone, the Federal Constitution alone, or both; and we would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution." *Department of Mental Hygiene of California v. Kirchner* (1965), 380 U.S. 194, 198; 85 S. Ct. 871, 874; emphasis by the court.

See also, *Jankovich v. Indiana Toll Road Commission,* (1965), 379 U.S. 487, 85 S.Ct. 493.

Neither will this Court search out, nor independently supply the necessary jurisdictional grounds for issuance of its Writ. It is petitioner's job to accurately state these grounds.

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." *Supreme Court Rule 23 (4).*

> "Not only must the question and decision exist which characterizes the state judgment as a reviewable one, but it must be made evident to the Supreme Court in petitioning for the appeal or certiorari." *13 Cyc. Fed. Proc.* (3rd Ed), *'Reviewable Judgments'*, §57.137, at pp 234-235.

A showing by petitioner that a Federal Constitutional issue was merely "involved" in the controversy before the lower courts is not sufficient. Rather, it must appear that

such issue was resolved and was the sole rationale and foundation of the final judgment rendered.

Warren has made no attempt to show this Court that the Federal Constitution provided the sole ground for the decision below, nor could it, for no such ruling is expressed or implied by the opinions of the trial court, the Michigan Court of Appeals or the Michigan Supreme Court.

> "In the absence of an explicit statement by the [New York] Court of Appeals that it annulled the assessment of the tax solely because of violation of the Federal Constitution, we are unable to find that the decision of the highest court of the State did not rest upon an adequate non-federal ground." *McGoldrick v. Gulf Oil Corporation* (1940), 309 U.S. 2, 3; 60 S. Ct. 375.

Moreover, it *affirmatively* appears from the opinions in both *Beauty Built* and *Metro* that there were, indeed, adequate Michigan Constitutional grounds for the decisions. The previously quoted language from *Beauty Built* specifically shows a violation by Warren of Article II, Section 1, Michigan Constitution (1908). It is equally clear that the *Metro* decision did not rely solely upon the Federal Constitution but, rather, that the Court of Appeals followed the rationale of the *Beauty Built* decision and held that the Metro class had the same right to recover from Warren as did the Beauty Built plaintiffs. Specifically, the *Metro* decision held that:

> "The 1959 resolution is invalid because it singles out the *Beauty Built* plaintiffs and the *Metro* class to finance the expansion of a sewage system that others were to use also. The right to recover the tap fees is designed to ensure that those who govern a municipality treat its citizens fairly. If municipal corporations were permitted to keep money gained in violation of constitutional principles,

there would be little in the Federal *and* Michigan Constitutions to deter them from favoring special interests with legislation similar to that in question.

"It seems to us that the 1965 ordinance not only fails to eliminate the reason for recovery, *but also fails to eliminate the unfairness created by the 1959 resolution.* * * *" 19 Mich. App. 664, 672-673; Appendix B, Petition for Writ of Certiorari, 41, 48-49, emphasis added.

Failure to show this Court that the decision below was grounded only upon "federal" principles justifies this Court's refusal of its Writ.

Petitioner's failure, however, is for the simplest of reasons; it cannot deny the fact that Michigan's Constitution gave the courts below adequate grounds for their rulings, and those courts so stated. This Court, by its own settled decisions construing 28 U.S.C. §1257 (3), has no jurisdiction to review this case.

II. THE PETITION IS NOT TIMELY FILED

A substantial portion of Warren's Brief, and specifically its first stated question (p. 3) and the argument at pages 9-13, represent an obvious attempt to seek review and reversal by this Court of the *1965 Beauty Built* decision. Indeed, the arguments advanced by Warren are largely extracted *verbatim* from Warren's *Beauty Built* brief and such arguments were expressly answered in *Beauty Built.* The Michigan Court has twice refused to distrub *Beauty Built* (denial of both rehearing in *Beauty Built* and leave to appeal in *Metro*) and the decision has subsequently been cited with approval by both the Michigan Supreme Court and Michigan Court of Appeals. There is no justification

for a belated (over five years) request that this Court now consider whether the 1959 Resolution was properly held in *Beauty Built* to violate both the Michigan and Federal Constitutions.

III. METRO LACKS NATIONAL OR SPECIAL IMPORTANCE

> "A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."
>
> (Supreme Court Rule 19(1))

This case involves a Michigan ruling by a Michigan State Court that a Michigan municipal resolution and ordinance violates both the Michigan and Federal Constitutions. There is no claim that the issues have national importance. Indeed, it does not even appear that the issues are of statewide significance to the jurisprudence of Michigan. Rather, the result in *Beauty Built* was clearly forecast by the Michigan Supreme Court in a *1963* decision dealing with a somewhat similar (but less discriminatory) tap fee for water main connections. (*Seltzer v. Sterling Township,* 371 Mich. 214 (1963).) The Michigan Supreme Court upheld that water fee but served notice that it would closely scrutinize this type of fee.

> ". . . we agree the method of financing is unique, and should bear close scrutiny by the courts to protect users from unreasonable and burdensome costs . . ."
>
> (*Seltzer,* at 222)

In short, a municipal revenue raising device has run afoul of a state constitution subsequent to a state Supreme Court ruling that such methods of financing would be closely scrutinized. The result (*Beauty Built* and *Metro)* is of only local interest and local application.

IV. THE 1965 ORDINANCE WORKS PRECISELY THE SAME DISCRIMINATION AGAINST THE METRO CLASS AS DID THE 1959 RESOLUTION

The class originally required by Warren to pay the sewer tap fee consisted entirely of the Beauty Built plaintiffs and the Metro class. Because of the arbitrary and discriminatory exclusion of the so-called "exempt structures", the class was ruled to be unconstitutional in *Beauty Built*. Warren now urges that by the enactment of the 1965 Ordinance, it has retroactively imposed the tap fee upon the owners of "exempt structures" and that the unconstitutional defect in the 1959 Resolution has vanished, retroactively. As will be seen, Warren's contention is fundamentally and constitutionally unsound. Warren could not, in 1965, retroactively remedy its earlier discrimination.

In ruling against Warren's contention, the Court of Appeals stated:

> "It seems to us that the 1965 ordinance not only fails to eliminate the reason for recovery, but also fails to eliminate the unfairness created by the 1959 resolution. Essential to the elimination of that unfairness is the extension of the sewer tap charge to the previously exempt structures . . ."
>
> "Retroactive legislation is often unfair because it detrimentally alters rights gained in reliance upon the prior law. Thus a person cannot be made to pay for goods or services if, in accepting them he had every reason to believe that acceptance would not incur a charge. See *Forbes Pioneer Boat Line v. Board of Comm'rs*, [258 U.S. 338, 42 S .Ct. 325 (1922)]. The previously exempt structures, having been connected to the sewage system in the reasonable belief that a tap-in was free of charge, accordingly remain exempt, and it cannot be said that the 1965 ordinance rectifies the arbitrary treatment of the *Metro class*."
>
> (19 Mich. App., at 673-674, Petition, Appendix B at pp. 49-50)

Before proceeding to those authorities which clearly support this ruling, one further matter may be of interest to the Court. Analysis of the sewer tap fees in *Beauty Built* required knowledge of the sophisticated revenue raising procedures which municipalities employ in Michigan and the interaction upon them of the Michigan Revenue Bond Act of 1933 (Mich. Comp. Laws '48, §141.101 et seq.; Mich. Stat. Ann §5.2731 et seq.); this was the enabling act pursuant to which the fees were ostensibly imposed. Counsel for Warren in this matter were also counsel for Warren in *Beauty Built*. They are recognized as among the leading experts in Michigan upon matters of municipal finance. In the course of *Beauty Built*, plaintiffs' counsel suggested that it was arbitrary for Warren to impose, by resolution on January 13, 1959, a charge for future sewer taps since the thousands of premises that had tapped in prior to January 13, 1959 had paid no charge at all. In other words, wasn't it possible for some sort of retroactive tap charge to be imposed? In the present proceedings, one of the principal questions before the lower court was the power of a municipality to retroactively impose a charge for having tapped into a sewer. Counsel for Warren in *Beauty Built* had little difficulty in replying to plaintiffs' suggestion. (The following excerpts are from *Warren's* Brief and Appendix in *Beauty Built;* we have supplied the emphasis.)

> "Obviously a sewer tap fee, or connection charge could not apply to those users *already connected* to the sanitary sewers of the City prior to January 13, 1959." (p. 10)

Similarly,

> "We are concerned in this case only with a tapping fee, which is a non-recurring charge paid when a sewer connection is made . . . *Obviously, such a charge could not, by its very nature, be applied to those buildings already connected to sewers.*" (p. 38)

Again,

> "As we have seen, the Bolema case [*North Muskegon v. Bolema Construction Co.*, 335 Mich. 520] upheld the validity of a tapping fee charge for revenue purposes in connection with a municipal utility system operated on a self-liquidating and sustaining basis under the Revenue Bond Act to provide funds to meet the needs of the system. *Such a charge obviously only applies to future connections.*" (p 42)

Finally,

> "The validity of tapping fees or connection charges of the type involved in this case as an additional revenue producing category of rate employed by a municipality in the operation of its water and sewer system on a utility rate basis has been fully established in Michigan by the *Bolema* case and nationally recognized in the other cases hereinbefore cited. *This category of rate obviously can only apply in futuro as it is not applicable by its very nature to those already connected.*" (p. 70)

Thus, in *Beauty Built,* Warren emphatically denied that it could, in 1959, retroactively charge the sewer tap fee to persons who had connected to the sewer in 1954, 1955, etc. Today, in *Metro,* Warren urges, equally emphatically, that it can, in 1965, retroactively charge that *same* sewer tap fee to persons who were never subject to any prior tap fee and who connected to the sewer in 1959, 1960, etc.

Both the trial court and the Court of Appeals cited *Forbes Pioneer Boat Lines v. Board of Com'rs,* 258 U.S. 338, 42 S.Ct. 325 (1922), as clear authority for the proposition that liability could not be substantively and retroactively created with respect to an act that occasioned no liability whatsoever when it was performed. This case,

prominently mentioned in both opinions, is not even cited in Warren's Brief. Yet it is strikingly similar to the *Metro* case. In *Forbes,* plaintiff boat company sought to recover a toll charge which the state had collected from it in 1917 for passage through a state-owned canal. The Florida Supreme Court, in 1919, ruled the charge unlawful and ordered a refund. Immediately following the 1919 Florida decision, the state enacted legislation authorizing the charge and validating the prior collections *retroactively.* Armed with the new legislation, the state then moved for a rehearing in the Florida Supreme Court. (Compare *Beauty Built,* the 1965 Ordinance, and Warren's Application for Rehearing in *Beauty Built.*) The Florida Court granted the rehearing and, relying upon the new act, reversed its decision and entered judgment of no cause for action. Justice Holmes, speaking for the Supreme Court, reversed the Florida decision thusly:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed. The argument that prevailed below was based on the supposed analogy of *United States v. Heinszen,* 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688 (*Rafferty v. Smith, Bell & Co.* [December 5, 1921] 257 U.S. 226, 42 Sup. Ct. 71, 66 L. Ed. 208), which held the Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. *Wagner v. Baltimore,* 239 U.S. 207, 216, 217, 36 Sup. Ct. 66, 60 L. Ed. 230. *Stockdale v. Atlantic Ins. Co.,* 20 Wall. 323, 22 L. Ed. 348. But generally ratification of an act is not good if attempted at a time when the ratify-

ing authority could not lawfully do the act. *Bird v. Brown*, 4 Exch. 786, 799. If we apply that principle this statute is invalid. For if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

. . .

"But Courts can not go very far against the literal meaning and plain intent of a constitutional text. Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation. It would seem from the first decision of the Court below that the transaction was not one for which payment naturally could have been expected. To say that the Legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot." (258 U.S. 338, at 339-340, 42 S. Ct. at 325-326)

Michigan law is equally clear that Warren could not, in 1965, retroactively impose liability in connection with a past act that occasioned no liability when performed.

In *Philip v. Heraty*, 147 Mich. 473 (1907), plaintiff sought damages alleging that defendant had negligently caused the death of plaintiff's "husband". Under the law at the

time of the accident, defendant was not liable to plaintiff because she was not legally the "widow". Thereafter a statute was enacted purporting to apply *both retrospectively and prospectively,* "curing" the illegality of the marriage. The Court refused to apply the statute retrospectively so as to render defendant liable to plaintiff.

> "There can be no doubt that the statute . . . is broad enough in its terms to cover the present case. *Defendants' counsel contend, however, that this statute is unconstitutional, for the reason that it constitutes an attempt to create a cause of action where none before existed.* • • •
>
> "The courts have not avowed a purpose to hold that the legislature may create a cause of action where none before existed. This power has been denied. • • •
>
> *"Dealing with the question in the abstract, it is difficult to find plausible reasons for sustaining the power of the legislature to create a new cause of action out of a past transaction. . . ."* (pp. 474-476; emphasis supplied)

In *Grand Rapids v. Lake Shore & Michigan Southern Ry. Co.,* 130 Mich. 238 (1902) defendant's property had been assessed for improvements—no personal liability was imposed. In an earlier case, defendant had successfully blocked the city's attempt to foreclose upon the land when payment was not made. Thereafter, in an attempt to salvage their position, the city obtained state legislation authorizing it to impose personal liability for this type of assessment. Relying upon this legislation, the city amended its ordinances to impose personal liability upon defendant *for the previous assessment.* The city recovered the assessment in an *assumpsit* action before the trial court but the judgment was reversed on appeal. The Court stated:

"The act attempts to create a personal liability to pay assessments previously made, where no liability existed when the assessments were made . . ."

"In *Hart v. Henderson,* 17 Mich 218, it was said by Chief Justice Cooley:

'Nothing is a tax simply because of being called so; but any proceedings by which a man's property is to be taken from him on a claim which has no other basis than the naked declaration of the legislature that it shall constitute a demand against him, is unconstitutional and void, as not being "according to the law of the land," but on the other hand, wholly unwarranted by legal principles.

'The only basis for the action in the present case is the declaration of the legislature that these assessments shall constitute a legal demand against [defendant]. [As was said in a previous but similar case]:

". . . When this tax was originally assessed, in 1884, under the law of 1881, as before said, it could not have been made by a personal claim against the owner of the land.

". . . The law of 1885 undertakes to make these taxes a personal claim against the owner of the land . . . *This act could not have the restrospective action contemplated by the act. Taxes levied after the act went into effect may properly be made a personal claim, but the rejected taxes of 1884, reassessed under the act of 1885, cannot, in our opinion, be made a personal claim against the owner of the land.*" [*Mogg v. Hall, 83 Mich 576*]

"We think the above case is controlling . . ." (pp. 242-244; emphasis supplied)

Similarly, in *Weber v. City of Detroit,* 158 Mich. 149 (1909), plaintiff's property had been assessed for village improvements—there was no personal liability. The assessment was not paid and thereafter the village was annexed by Detroit. There were certain irregularities in the assessment and Detroit sought to cure those irregularities *and to retroactively make the assessments a personal obligation.* With respect to such retroactive liability, the court stated:

> "We are not cited to any section of the law which makes the owner of the land personally liable for an assessment of the character here involved. *If the law annexing the village . . . to Detroit should be given a retroactive effect, and the attempt be made to apply the curative section above quoted, a difficulty would be encountered in the Constitution, as it is beyond the powers of the legislature to create a personal liability for a claim of this character by retroactive legislative enactment . . .*" (pp. 150-151; emphasis supplied)

Warren cites no authority for its assertion that owners of "previously exempt structures" can, in 1965, be charged for the act of tapping into a sewer in 1959, and the reason is clear. Prior to the 1965 Ordinance, no law, valid or invalid, required the owners of the "previously exempt structures" to pay a tap charge. They were simply like the thousands of structures who had tapped into the sewer *prior* to 1959 without paying any charge. They cannot now be singled out to pay a retroactive tap fee.

Warren contends that it is *not* charging a tap fee retroactively, it is merely removing, retroactively, an "invalid appendage" from the 1959 Resolution thereby "including" the previously exempt structures within the terms of the 1959 Resolution "as if" they had always been included. In short, Warren is merely retroactively doing in 1965, that

which it "forgot" to do in 1959. With only minor paraphrasing, Justice Holmes provides an answer to Warren's assertion that it can somehow turn the clock backwards to retroactively impose liability where none previously existed.

> "To say that [Warren] simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the [owners of previously exempt structures tapped into the sewer] relying upon its legal rights *and it is not to be deprived of them because* [*Warren*] *forgot.*" (*Forbes*, 258 U.S. at 340, 42 S.Ct., at 326; emphasis supplied)

The 1959 Resolution specifically exempted certain structures from payment of the fee. For over six years in *Beauty Built* Warren strongly and positively asserted its right so to act. A court cannot simply "erase" these facts and return to 1959 to create a totally new situation as Warren would have it do. This, indeed, "would be putting something of a gloss upon the facts." Furthermore, Warren twists the *Beauty Built* decision beyond recognition. The Michigan Supreme Court did not strike down a so-called "invalid appendage." Obviously it was beyond the power of the judiciary to rewrite Warren's legislation so as to directly create and impose a liability where the legislature had not. On the contrary, the Court held that *because* the city council had arbitrarily excluded certain structures from the tap fee, the city council had "created an arbitrary and discriminatory classification of persons *required to pay* the tap fee." (*Beauty Built* at 287; emphasis supplied.) It is a travesty to interpret *Beauty Built* as somehow providing Warren with the power and authority to retroactively charge the previously exempt structures. *Beauty Built* ordered Warren to refund the unconstitutional sewer tap fee—not to amend its ordinances.

Clear and undeniable authorities conclusively hold that Warren is constitutionally unable, as of April 20, 1965, to treat the previously exempt group as it treated the *Metro* class. Furthermore, there emerges from the record in *Metro* the startling admission by Warren that as of December 7, 1967, over two and one-half years *after* the enactment of the 1965 Ordinance, *not one dime* had been collected by Warren from any of the previously exempted structures although Warren knew 1661 of such structures had tapped into the sewer free of charge between January 13, 1959 and April 9, 1965.

It would appear that the 1965 Ordinance, insofar as it purports to retroactively charge a sewer tap fee to previously exempt structures, is not only unconstitutional on its face, but is also merely a litigious sham. What is left? Simply a 1965 Ordinance that repeats and seeks to affirm an unconstitutional discrimination initiated in 1959.

V. THE METRO CLASS POSSESSES VESTED RIGHTS TO RECOVER THE SEWER TAP FEE AND WARREN CANNOT RETROACTIVELY DENY THOSE RIGHTS

The trial court ruled that the effect of the *Beauty Built* decision was to void Warren's sewer tap fee ordinance *ab initio* citing Cooley, *Constitutional Limitations* (7th Ed.) p. 259:

> "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it, contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made." (Petition, Appendix A, p. 28)

This is in accord with Michigan rulings.

". . . it has been held several times in this State that an unconstitutional statute is a statute only in form, and lacks the force of law, and is of no more saving effect to justify action under it than as though it had never been enacted. *Mason v. Perkins,* 73 Mich 303 (41 N.W. 426); *Adsit v. Osmun,* 84 Mich 420 (48 N.W. 31, 11 L.R.A. 534)"

(*Sugar Co. v. Auditor General,* 124 Mich. 674, 682)

The Court of Appeals followed these teachings when it stated:

"Accordingly, these charges must be sustained, if they are to be sustained at all, as charges for past acts of tapping which, due to the invalidity of the 1959 resolution, were not subject to an enforceable charge when they occurred.

"Such a charge is impermissible, however, for a liability may not be imposed on account of a past act if an enforcible obligation was not occasioned when the act took place. *Forbes Pioneer Boat Line v. Board of Comm'rs* (1922), 258 US 338 (42 S Ct 325; 66 L Ed 647). This rule of due process may be subsumed under the principle that retroactive legislation may not impair vested rights." (19 Mich. App., at 671-672, Petition, Appendix B, p. 47)

Each time a Metro class member paid a sewer tap fee to Warren there arose in behalf of such member a cause of action to recover that fee since payment was required only by the unconstitutional 1959 Resolution. All of those causes of action are gathered together in this class proceeding. Since this suit deals only with sewer tap fees paid *prior* to the effective date of the 1965 Ordinance, each and every cause of action for refund had fully accrued and was being litigated at the time the 1965 Ordinance was enacted.

The constitutional principles which support, indeed *require,* the rulings of the trial court and the Court of Appeals were succinctly stated by Justice Holmes in *Forbes, supra.*

> *"Stripped of conciliatory phrases, the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed . . ."*
>
> . . .
>
> ". . . Courts cannot go very far against the literal meaning and plain intent of a constitutional text. *Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right.* It is hard to find any ground for saying that the promise of the law that the public forces shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. *Yet no one would say that a claim for goods sold could be abolished without compensation . . .*" (158 U.S. 338, at 339-340, 42 S. Ct. 325, 326; emphasis supplied)

Although the term "vested" may be simply a conclusion based upon the particular situation involved, numerous Michigan decisions show that the right of the *Metro* class to recover the fees unconstitutionally extracted from them is a "vested" right. The following cases are merely illustrative:

In *Cusick v. Feldpausch,* 259 Mich. 349 (1932), plaintiff was injured while a guest passenger in an automobile owned by defendant. At the time of the accident plaintiff had a cause of action against defendant based upon ownership of the car and the ordinary negligence of the driver who had permission to drive from defendant. Subsequent to the accident, but before plaintiff brought suit, Michigan a-

mended the "implied consent" owner liability statute to require that a guest passenger show gross, wilful, etc., negligence in order to recover. *The court refused to apply the amendment retroactively to plaintiff.* After observing that the language of the amendment appeared to be prospective in nature, the court continued:

> *"Moreover, when it became a law, plaintiff's right of action for damages to person and property under the former statute had accrued and was in her a vested right, which the new statute did not take away."* (pp. 351-352; emphasis supplied)
>
> • • •
>
> *"The effect of the change, if given retrospective effect, would be to deprive plaintiff and others similarly situated of right of action. This court has recognized that a common law right of action is property and entitled to protection.* • • • By the weight of authority, a statutory right of action for damage to person or property, which has accrued, is a vested right and likewise to be protected." (pp. 353-354; emphasis supplied)

In *Arenac County v. Iosco County Supervisors* 158 Mich. 344 (1909), Arenac County furnished medical attention to a resident of Iosco County and sought reimbursement from Iosco County. An existing statute authorized such payment but that authority was deleted by subsequent amendment. Iosco then refused to pay and suit was brought. The Court had little difficulty in disposing of Iosco's argument that the amendment should be enforced retroactively.

> "[Arenac's] rights vested under [the prior law] and were not lost by the amendment . . . which should be held to be limited to cases arising thereafter:
>
> (1) Under the rule that statutes will not be considered retroactively unless the intent that they should have retroactive effect clearly appears.• • •

> (2) It cannot be construed as retroactive to the detriment of vested rights. *Crane v. Reeder*, 21 Mich 24 (4 Am. Rep. 430); *Van Fleet v. Van Fleet*, 49 Mich 610 (14 N. W. 566); *Todd v. Boards of Election Com'rs*, 104 Mich 474 (62 N. W. 564, 64 N. W. 496, 29 L.R.A. 330); *Cooley on Constitutional Limitations* (7th Ed.), p 528; *Ludwig v. Stewart*, 32 Mich 27; *Harrison v. Metz*, 17 Mich 377; *McKisson v. Davenport*, 83 Mich 211 (47 N.W. 100, 10 L.R.A. 507); *Atherton v. Village of Bancroft*, 114 Mich 241 (72 N. W. 208); *Angell v. West Bay City*, 117 Mich 688 (76 N. W. 128); *Broffee v. City of Grand Rapids*, 127 Mich 92 (86 N. W. 401); *Heineman v. Schloss*, 83 Mich 153 (47 N. W. 107); *Stitt v. Casterline*, 89 Mich 239 (50 N. W. 847); *Finn v. Haynes*, 37 Mich 63; *Danville Stove & Manfg. Co. v. Kent Circuit Judge*, 88 Mich 244 (50 N. W. 140); *Philip v. Heraty*, 147 Mich 473 (111 N. W. 93, 118 Am. St. Rep. 554); *Little v. Bousfield & Co.*, 154 Mich 369 (117 N. W. 903) *Endlich on Interpretation of Statutes*, Section 271; *Potter's Dwarris on Statutes*, p. 163; *Boughner v. Bay City*, 156 Mich 193 (120 N. W. 597)." (pp. 347-348)

Also applicable here are the cases heretofore cited to show that the previously exempt group cannot be subjected to retroactive liability. In other words, a right to be free of retrospective and substantive liability is but the other side of the principle that an existing cause of action for a substantive constitutional violation cannot be legislated out of existence. The Court of Appeals recognized this and also recognized the strong policy considerations supporting the return of the fees to the Metro class. That Court stated:

> "The right to recover the tap fees is designed to ensure that those who govern a municipality treat its citizens fairly. If municipal corporations were

> permitted to keep money gained in violation of constitutional principles, there would be little in the Federal and Michigan Constitutions to deter them from favoring special interests with legislation similar to that in question." (19 Mich. App. at 673, Petition, Appendix B, pp. 48-49)

In a further attempt to justify retrospective liability upon the Metro class for the tap fee, Warren asserts the somewhat awkward contention that it and the Metro class "entered into a contract" when building permits were applied for and the tap fee paid, that the class received a "benefit" and that the class now seeks to dishonor that "contract". (Petition, p. 21) We submit that this is undoubtedly one of the most incredible "contracts" this Court has ever seen.

There is no question but that each member of the class had to pay the tap fee in order to obtain building permits. Such a payment is so obviously coerced that the Michigan Supreme Court has ruled that it automatically constitutes a payment under protest *as a matter of law. (Beachlawn Corp. v. St. Clair Shores,* 376 Mich. 261 (1965), reh. den. Jan. 5, 1966) Indeed, as *Beechlawn* pointed out, plaintiff's alternative to making the payment would be to go out of business or to simply abandon construction plans. Is this the stuff of which "contracts" are made?

Perhaps "paid under protest" is too light a term to attach to such a transaction. Again the matter is summed up neatly by Justice Holmes:

> "Defendant owed the plaintiff a definite sum of money *that it had extorted from the plaintiff without right." (Forbes,* 258 U.S. at 340; 42 S. Ct., at 326; emphasis added)

Warren's argument with respect to "benefits" is no more persuasive than its "contract" theory and offers no support whatever for retrospective liability.

Ignoring the 1965 Ordinance for the moment, there *never* was a valid legal sewer tap charge in Warren. The 1959 Resolution is utterly void and of no effect *ab initio*. The act of tapping into a sewer created no obligation, legal or equitable, on the part of a Metro class member to pay anything to anyone. It created no legal obligation because there was no law imposing any required payments. It created no equitable obligation because the act of tapping itself clearly is not one which necessarily implies that some sort of payment shall be made as a condition precedent. This is obvious from the fact that many communities impose no such charge at all and many structures tapped into the Warren sewer *before* January 13, 1959 without being asked (nor are they even now being asked) to pay a tap charge. Moreover, many previously constructed structures tapped in after January 13, 1959 and Warren was, *until April 20, 1965*, perfectly content to let them do so without charge. The fact that the Michigan Supreme Court permitted the Beauty Built plaintiffs to recover all fees paid plus interest seems a rather clear indication that the Court did not see any special advantage or benefit to them for which payment might be naturally expected. Thus, any alleged "benefit" which members of the Metro class received was the same "benefit" that other residents of Warren were receiving perfectly free of charge.

In this connection, the *lower* court's opinion in *Forbes* is particularly enlightening. (*Board of Com'rs v. Forbes Pioneer Power Boat Line*, 80 Fla. 252, 86 So. 199 (1920), rev'd 258 U.S. 338, 42 S. Ct. 325 (1922).) The Florida

court *upheld* the retroactive effect of the 1919 statute, although the court recognized that there were serious vested rights problems involved. However, the Florida court found a so-called "moral obligation" on the part of Forbes arising out of its voluntary use of the canal and its receipt of "benefits" for the payment of the toll charge. On appeal, Justice Holmes succinctly rejected the "moral obligation" argument:

> ". . . if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so *any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.*
>
> "It would seem from the *first* decision of the Court below that the transaction was not one for which payment could have been expected." (258 U.S. 338, at 339-340, 42 S. Ct. at 325, 326; emphasis supplied)

In short, there is neither "contract" nor "benefit" to support Warren's belated attempt to impose liability upon the Metro class.

Finally, we submit that Warren's aguments with respect to "contract" and "benefits", *even if valid,* deal only with the Metro class. Thus, even if these elements did exist, and could support retroactive liability on the Metro class, not one word of explanation is offered by Warren as to how this cures the original discrimination against the Metro class because none of these "elements" have anything to do with the previously exempt group nor do they justify retrospective liability upon *that* group. It is wholly irrational to assert that a previously exempt owner who tapped in on January 13, 1959 received a "benefit" adequate

to support retroactive liability while an owner who tapped in on January 11th, or 12th, or in 1958, etc., did not! Obviously, *no* special benefit was received by anyone.

The "special assessment" cases cited by Warren to support retroactive liability are simply irrelevant and were so treated by the Court of Appeals. (19 Mich. App. at 671, Petition, Appendix B, pp 46-47) It has already been observed that counsel for Warren emphatically recognized in *Beauty Built* that the act of connecting into a sewer is not a fit candidate for a retroactive charge. Moreover, the assessment cases involve situations where timing distinctions are not the concern—the question is whether there has been a benefit to assessed property and whether the cost has been properly apportioned. In assessment cases, the assessment may be spread before, during or after construction of the improvement. There are no "retroactive" features. As the Michigan Court pointed out in *Brevoort v. City of Detroit*, 24 Mich 322, an assessable improvement "confer[s] a continuing power . . . [in the municipality] . . . that is not exhausted until an assessment is made which can be enforced." (p 326) Furthermore, even in the case of special assessments, considerable doubt exists that an assessment or re-assessment can be ordered where the original proceedings were jurisdictionally defective. (See *Crawford v. City of Detroit*, 169 Mich 293 (1912).) In the instant case, the original proceedings were *constitutionally* defective as to the Metro class. With respect to the previously exempt group, there wasn't even an "original" proceedings. The 1965 ordinance is the *first* proceeding as far as they are concerned. We submit, therefore, that Warren's assessment cases simply have no application.

VI. THE 1965 ORDINANCE IS, ITSELF, GUILTY OF UNCONSTITUTIONAL DISCRIMINATION

The *Beauty Built* decision, and the numerous cases cited therein make it abundantly clear that legislative classifications and distinctions must be drawn with logic and reasonable care. Violation of this principle is a violation of the Fourteenth Amendment to the United States Constitution and to Article 1, Sections 1 and 2 of the Michigan Constitution (previously Article II, Section 1 of the 1908 Constitution). As will be seen, Warren has *again* violated these constitutional principles with its 1965 Ordinance.

The 1959 Resolution was voided by the *Beauty Built* decision. It can furnish no legal or equitable basis or justification for subsequent legislative action. Prior to April 20, 1965, Warren legally had no sewer tap fee. The 1965 Ordinance must stand or fall on its own and it must be viewed and analyzed in terms of a municipality's right and authority to enact such an ordinance in *1965.*

We put aside, for the moment, certain profound constitutional defects apparent in this 1965 Ordinance. We assume, *arguendo,* that Warren has the power and authority to ignore vested rights and to retroactively create liability for a sewer connection. We deal here only with the *classifications* and *distinctions* made in the 1965 Ordinance. Those classifications and distinctions are to be reviewed against the following Michigan Constitutional requirements:

> "This Court has repeatedly held that classifications of objects to which a municipal ordinance may be made applicable *must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the ordinance.* See

Palmer Park Theatre Company v. City of Highland Park, 362 Mich 326; *Mulloy v. Wayne County Board of Supervisors*, 246 Mich 632.

"Where an ordinance fails to include and affect alike all persons of the same class, and extends immunities or privileges to one part and denies them to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal Constitutions. See *Haynes v. Lapeer Circuit Judge*, 201 Mich. 138."

(*Beauty Built*, pp 235-236; Court's own emphasis)

(a) Why is January 13, 1959 used as a dividing line between classes.

The effect of the 1965 Ordinance is to retroactively create on *April 20, 1965*, a sewer tap fee for all taps subsequent to January 13, 1959. Prior to *April 20, 1965*, Warren legally had no sewer tap fee. What basis is there for the retroactive selection, in *April 1965*, of the date January 13, 1959 as a dividing line between classes, between those who pay and those who tap free of charge? It must be emphasized that the class of persons required to pay the fee is being created, if at all, *on* April 20, 1965. There were many taps into the sewer system both before and after January 13, 1959. Why retroactively charge only for taps after that date? The theory that Warren might have legally acted *on* January 13, 1959 to create a charge on *all* future taps in no way justifies its selection of that date when it acts *on* April 20, 1965. (Indeed, we might suppose that Warren "could" have acted *on* any day in the past.)

The simple truth is that January 13, 1959, is and always has been a purely meaningless date in Warren's sewage

system history and there is absolutely nothing which justifies its selection, *on April 20, 1965,* to serve as a dividing point between classes. This is convincingly demonstrated by the ruling of the Michigan Supreme Court in *Beauty Built* that:

> "In the case before us no reasonable or rational foundation has been submitted to support the exemption and classification created by the ordinance. The date January 13, 1959, seems to have been chosen simply because it was the date defendant city decided to begin raising additional revenues. It certainly was not chosen because it formed a reasonable or rational date for establishing a division of a class."
>
> (*Beauty Built,* p. 235)

With the now *alleged* "freedom" to retroactively select any reasonable or rational past date as the dividing line, did Warren seek a reasonable or rational date in the past? Clearly not. Instead, Warren blithely proceeded to "compound a felony" by selecting *that very date* which the Michigan Supreme Court in *Beauty Built* had already ruled to be *not* a reasonable or rational date for establishing a division of a class.

Warren obviously had no thought other than to feverishly attempt to retain, by whatever device it could, all funds unconstitutionally extracted from the Metro class (and the Beauty Built plaintiffs as well). It is, perhaps, the height of understatement to merely comment that such a motive furnishes neither an equitable nor a legal basis for the legislative establishment of a class. Two constitutional wrongs do not make a right.

(b) Why are the terms of payment different.

Again, assuming *arguendo* that Warren *could* have imposed a valid ordinance in 1965 effective retroactively, the 1965 Ordinance could not do so for reasons in addition to those already stated. According to the 1965 Ordinance, the charge upon premises connected after January 13, 1959, without prior payment to Warren, is $200.00 — $3,200.00 depending upon the type of tap, payable at the time of the first water billing to the premises *after April 20, 1965,* or payable in 40 quarterly installments at one per cent interest per quarter *from April 20, 1965.* Nothing is said in the 1965 Ordinance concerning those premises upon which sewer tap fees *were* paid between 1959-1965 and presumably it is Warren's intention simply to keep such payments.

There were at least 1661 structures connected to the sewer without charge between January 13, 1959 and April 9, 1965. The 1965 Ordinance does not require that their payment of the charge include interest from the actual time of the tap. Why not? It is no answer to say that the previously exempt group is not being charged interest for any period prior to April 20, 1965 because they had no obligation to pay prior to April 20, 1965. *No one, Metro class or otherwise, had any legally valid obligation prior to April 20, 1965.* (arguendo) Yet Warren has, in effect, "pre-collected" the Metro class payments—in some cases by as much as six years. Does the 1965 Ordinance obligate Warren to pay the Metro class members interest on these "pre-collections" for the time when Warren unconstitutionally had the use of these funds? It does not.

It is clear that this discrimination is a denial of equal protection under both Michigan and Federal Constitutions. Particularly is this so when the record shows that Warren

profited from the fees unconstitutionally extracted from the Metro class.

> [Testimony of Clarence J. Steinhauser, a Certified Public Accountant employed by Warren, describing the account in which the sewer tap fees were placed. Appellants' Appendix, *Beauty Built*, Rec. and Brief, Vol. 4689.]
>
> "A. I'd have to see the name of the fund to tell exactly what name we carried it under, but it was just tap money we put in there.
>
> Q. And nothing else?
>
> A. *And the interest on the investments.* (p. 52a; emphasis supplied)
>
> • • • • •
>
> Q. Mr. Steinhauser, to your knowledge are there any funds in the sewage treatment plant improvement fund other than those funds which were received by reason of the sewer tap charge which has been adopted?
>
> A. No. There, *yeah, other interest. There is interest in there.*
>
> Q. *There is interest in there?*
>
> A. *Interest in there.*" (p. 57a; emphasis supplied)

The unlawful discrimination is also readily apparent in the installment provision of the 1965 Ordinance.

The discriminatory failure of the 1965 Ordinance to charge interest from the time of the tap, rather than from April 20, 1965, has been discussed and will not be repeated. This failure is also applicable to the provisions for installment payments. Furthermore, permitting installment payments to the previously exempt group, while denying such privilege to others (the Metro class), is another example of unlawful discrimination.

All members of the Metro class, be they professional builders or persons building structures for their own per-

sonal or business use, were required to pay the tap fee to Warren before a building permit would be issued. Installment payments were not permitted. It doesn't take much imagination, (and this Court certainly can take judicial notice thereof), to know what choice a business man would take if offered the option of immediate payment of a debt or the opportunity to pay it in 40 quarterly installments at simple four per cent interest on the declining balance. *The United States of America can't even borrow money that favorably—now or in 1965.*

Since any obligation to pay sewer tap fees arise out of 1965 Ordinance (*if it arises at all*) Warren had a clear constitutional duty to treat all obligees equally. This could only be done by first refunding all sewer tap payments previously made plus accrued interest. Then, in order to treat all alike, Warren should have offered the same optional payments terms to all. That this might have caused Warren administrative difficulty is completely immaterial. *Constitutional rights may not be sacrificed to accommodate municipal bookkeeping problems.*

(c) The previously exempt group is still exempt.

It has already been demonstrated that Warren cannot, in 1965, retroactively re-write the 1959 Resolution to impose liability where none previously existed. In short, the constitutional infirmity presented by the 1965 Ordinance is *precisely* the same defect so thoroughly argued and condemned in *Beauty Built*. In addition, Warren's continued granting of "favors" to the previously exempt group, plus the admitted fact that Warren had made no attempt whatsoever to enforce the 1965 Ordinance against the previously exempt group (19 Mich. App. at 673, footnote 7; Petition, Appendix B, at p. 49, footnote 6 [sic]) provide additional examples of unconstitutional discrimination.

CONCLUSION

For the foregoing reasons, Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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